UNITED STATES REPORTS

VOLUME 463

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1982

JUNE 24 THROUGH SEPTEMBER 27, 1983

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

END OF TERM

HENRY C. LIND

REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
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ERRATA

461 U. S. 299, n. 6, line 1: "60 Stat. 30" should be "67 Stat. 30".

462 U. S. 694, line 12: Insert "*Co.*" after "*Electric,*" and replace "*supra*" with "429 U. S. 125 (1976)".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.

RETIRED

POTTER STEWART, Associate Justice.

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, Attorney General.
REX E. LEE, Solicitor General.
ALEXANDER L. STEVAS, Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, **WARREN E. BURGER**, Chief Justice.

For the First Circuit, **WILLIAM J. BRENNAN, JR.**, Associate Justice.

For the Second Circuit, **THURGOOD MARSHALL**, Associate Justice.

For the Third Circuit, **WILLIAM J. BRENNAN, JR.**, Associate Justice.

For the Fourth Circuit, **WARREN E. BURGER**, Chief Justice.

For the Fifth Circuit, **BYRON R. WHITE**, Associate Justice.

For the Sixth Circuit, **SANDRA DAY O'CONNOR**, Associate Justice.

For the Seventh Circuit, **JOHN PAUL STEVENS**, Associate Justice.

For the Eighth Circuit, **HARRY A. BLACKMUN**, Associate Justice.

For the Ninth Circuit, **WILLIAM H. REHNQUIST**, Associate Justice.

For the Tenth Circuit, **BYRON R. WHITE**, Associate Justice.

For the Eleventh Circuit, **LEWIS F. POWELL, JR.**, Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *It is ordered* that the **CHIEF JUSTICE** be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1982

FRANCHISE TAX BOARD OF CALIFORNIA *v.* CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-695. Argued April 19, 1983—Decided June 24, 1983

Appellee Construction Laborers Vacation Trust for Southern California (CLVT) was established by an agreement between construction industry employer associations and a labor union to provide a mechanism for administering the provisions of a collective-bargaining agreement granting construction workers a yearly paid vacation. The trust qualifies as a "welfare benefit plan" within the meaning of § 3 of the Employee Retirement Income Security Act of 1974 (ERISA), and hence is subject to regulation under ERISA. Appellant California Franchise Tax Board filed a complaint in California state court against CLVT and its trustees, alleging two causes of action: (1) that CLVT had failed to comply with certain tax levies issued under a California statute, thereby becoming liable for damages for such failure, and (2) that, in view of the defendants' contention that ERISA pre-empted state law and that the trustees lacked power to honor the levies, a judgment be issued declaring the parties' respective rights. CLVT removed the case to Federal District Court, which, after denying appellant's motion for remand to the state court, held that ERISA did not pre-empt the State's power to levy on the funds held in trust by CLVT. The Court of Appeals reversed.

Held: The case is not within the removal jurisdiction conferred by 28 U. S. C. § 1441. Pp. 7-28.

(a) Where there is no diversity of citizenship between the parties, as in this case, the propriety of removal turns on whether the case falls within the original "federal question" jurisdiction of United States district courts under 28 U. S. C. § 1331 (1976 ed., Supp. V). Under the "well-pleaded complaint" rule, a defendant may not remove such a case to federal court unless the *plaintiff's* complaint establishes that the case "arises under" federal law within the meaning of § 1331, and it may not be removed on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the complaint and both parties admit that the defense is the only question truly at issue. Pp. 7–12

(b) For appellant's first cause of action, a straightforward application of the well-pleaded complaint rule precludes original federal-court jurisdiction, and thus the cause of action was not removable. California law establishes a set of conditions, without reference to federal law, under which a tax levy may be enforced; federal law becomes relevant only by way of a defense to an obligation created entirely by state law, and then only if appellant has made out a valid claim for relief under state law. Pp. 13–14.

(c) Nor is appellant's second cause of action removable to federal court. Under the federal jurisdictional statutes, federal courts do not have original jurisdiction, nor do they acquire jurisdiction on removal, when a federal question is presented by a complaint for a state declaratory judgment, and where, if the plaintiff had sought a federal declaratory judgment, federal jurisdiction would be barred by *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667, under which federal jurisdiction is lacking if, but for the availability of the federal declaratory judgment procedure, a federal claim would arise only as a defense to a state-created action. The situation presented by a State's suit for a declaration of the validity of state law is sufficiently removed from the spirit of necessity and careful limitation of federal district court jurisdiction that informed this Court's statutory interpretation in *Skelly Oil* and *Gully* v. *First National Bank in Meridian*, 299 U. S. 109, to convince the Court that, until Congress informs it otherwise, such a suit is not within the district courts' original jurisdiction. Accordingly, the same suit brought originally in state court is not removable. Pp. 14–22.

(d) A suit by state tax authorities under a statute like the California tax levy statute involved here does not "arise" under ERISA. The State's right to enforce its tax levies is not of central concern to the federal statute. *Avco Corp.* v. *Machinists*, 390 U. S. 557, distinguished. Even though ERISA may preclude enforcement of the State's levy in the circumstances of this case, an action to enforce the levy is not itself pre-empted by ERISA. On the face of a well-pleaded complaint there are many reasons completely unrelated to ERISA's provisions and purposes why the State may or may not be entitled to the relief it seeks. Moreover, ERISA does not provide an alternative cause of action in the State's favor to enforce its rights. Nor does appellant's second cause of action arise under ERISA. ERISA enumerates the parties entitled to seek a declaratory judgment under § 502 of that Act; it does not provide anyone other than participants, beneficiaries, or fiduciaries of an ERISA-covered plan with an express cause of action for a declaratory judgment on the issues of this case. A suit for similar relief by some other party does not "arise under" that provision. Pp. 22–27.

679 F. 2d 1307, vacated and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court.

Patti S. Kitching, Deputy Attorney General of California, argued the cause for appellant. With her on the briefs were *John K. Van De Kamp*, Attorney General, and *Edmond B. Mamer*, Deputy Attorney General.

James P. Watson argued the cause for appellees. With him on the brief were *George M. Cox* and *John S. Miller, Jr.**

JUSTICE BRENNAN delivered the opinion of the Court.

The principal question in dispute between the parties is whether the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.* (1976 ed. and Supp. V), permits state tax authorities

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**William D. Dexter* filed a brief for the Multistate Tax Commission as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General Lee*, *Stuart A. Smith*, *T. Timothy Ryan, Jr.*, *Karen I. Ward*, and *Allen H. Feldman* for the United States; by *J. Albert Woll*, *Laurence Gold*, and *George Kaufmann* for the American Federation of Labor and Congress of Industrial Organizations; by *Thomas E. Stanton, Jr.*, and *Victor J. Van Bourg* for the Boards of Trustees of the Carpenters Vacation and Holiday Trust Fund for Northern California et al.; and by *Eugene B. Granof* and *George J. Pantos* for the ERISA Industry Committee (ERIC).

Joseph I. Lieberman, Attorney General, *Christina G. Dunnell*, Assistant Attorney General, and *Ann Thacher Anderson* filed a brief for the State of Connecticut et al. as *amici curiae*.

to collect unpaid state income taxes by levying on funds held in trust for the taxpayers under an ERISA-covered vacation benefit plan. The issue is an important one, which affects thousands of federally regulated trusts and all nonfederal tax collection systems, and it must eventually receive a definitive, uniform resolution. Nevertheless, for reasons involving perhaps more history than logic, we hold that the lower federal courts had no jurisdiction to decide the question in the case before us, and we vacate the judgment and remand the case with instructions to remand it to the state court from which it was removed.

I

None of the relevant facts is in dispute. Appellee Construction Laborers Vacation Trust for Southern California (CLVT)[1] is a trust established by an agreement between four associations of employers active in the construction industry in southern California and the Southern California District Council of Laborers, an arm of the District Council and affiliated locals of the Laborers' International Union of North America. The purpose of the agreement and trust was to establish a mechanism for administering the provisions of a collective-bargaining agreement that grants construction workers a yearly paid vacation.[2] The trust agreement expressly proscribes any assignment, pledge, or encumbrance of funds held in trust by CLVT.[3] The Plan that CLVT administers is unquestionably an "employee welfare benefit plan" within the meaning of § 3 of ERISA, 29 U. S. C. § 1002(1), and CLVT and its individual trustees are thereby subject to extensive regulation under Titles I and III of ERISA.

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[1] Along with CLVT itself, CLVT's individual trustees are also appellees. At various points throughout this opinion, the trust and its trustees are referred to collectively as "CLVT."

[2] As part of the hourly compensation due bargaining unit members, employers pay a certain amount to CLVT, which places the money in an account for each employee. Once a year, CLVT distributes the money in each account to the employee for whom it is kept, provided the employee complies with CLVT's application procedures. Any funds held for employees who fail to make a timely application are used to defray CLVT's administrative expenses. See generally Trust Agreement, Art. IX, App. 45–51 ("The Plan"). This system was set up in large part because union members typically work for several employers during the course of a year.

Appellant Franchise Tax Board is a California agency charged with enforcement of that State's personal income tax law. California law authorizes appellant to require any person in possession of "credits or other personal property or other things of value, belonging to a taxpayer" "to withhold . . . the amount of any tax, interest, or penalties due from the taxpayer . . . and to transmit the amount withheld to the Franchise Tax Board." Cal. Rev. & Tax. Code Ann. § 18817 (West Supp. 1983). Any person who, upon notice by the Franchise Tax Board, fails to comply with its request to withhold and to transmit funds becomes personally liable for the amounts identified in the notice. § 18818.

In June 1980, the Franchise Tax Board filed a complaint in state court against CLVT and its trustees. Under the heading "First Cause of Action," appellant alleged that CLVT had failed to comply with three levies issued under § 18817,[4] concluding with the allegation that it had been "damaged in a sum . . . not to exceed $380.56 plus interest from June 1, 1980." App. 3–8. Under the heading "Second Cause of Action," appellant incorporated its previous allegations and added:

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[3] Article IX, ¶ 9.08, provides in part:

"[N]o payments due the Fund and no monies in vacation accounts established pursuant to the Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, encumbrance or charge by any employee or any other persons and any such anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge shall be void and ineffective. The money credited to a vacation account shall be subject to withdrawal and distribution only at the times, in the manner and for the purposes specified in this Agreement." *Id.*, at 49.

Section 404(a)(1) of ERISA, 29 U. S. C. § 1104(a)(1) (1976 ed. and Supp. V), requires plan trustees to discharge their duties "solely in the interest of the participants and beneficiaries," "for the exclusive purpose of . . . providing benefits . . . and . . . defraying reasonable expenses of administering the plan," and "in accordance with the documents and instruments governing the plan" insofar as they are consistent with ERISA. §§ 1104(a)(1)(A), (D).

[4] At several points in 1977 and 1978, appellant issued notices to CLVT requesting it to withhold and to transmit approximately $380 in unpaid

> "There was at the time of the levies alleged above and continues to be an actual controversy between the parties concerning their respective legal rights and duties. The Board [appellant] contends that defendants [CLVT] are obligated and required by law to pay over to the Board all amounts held . . . in favor of the Board's delinquent taxpayers. On the other hand, defendants contend that section 514 of ERISA preempts state law and that the trustees lack the power to honor the levies made upon them by the State of California.

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taxes, interest, and penalties due from three individuals. CLVT did not dispute that the individuals in question were beneficiaries of its trust or that it was then holding vacation benefit funds for them. In each case, however, it acknowledged receipt of appellant's notice and informed appellant that it had requested an opinion letter from the Administrator for Pension and Welfare Benefit Programs of the United States Department of Labor as to whether it was permitted under ERISA to honor appellant's levy. CLVT also informed appellant that it would withhold the funds from the individual workers until it received an opinion from the Department of Labor, but that it would not transmit the funds to the Franchise Tax Board.

Appellant took no immediate action to enforce its levy, and in January 1980 CLVT finally received the opinion letter it had requested. The opinion letter concluded: "[I]t is the position of the Department of Labor that the process of any state judicial or administrative agency seeking to levy for unpaid taxes or unpaid unemployment insurance contributions upon benefits due a participant or beneficiary under the Plan is pre-empted under ERISA section 514 [29 U. S. C. § 1144]." App. 71. Accordingly, on January 7, 1980, counsel for CLVT furnished appellant a copy of the opinion letter, informed appellant that CLVT lacked the power to honor appellant's levies, and stated their intention to recommend that CLVT should disburse the funds it had withheld to the employees in question.

> "[D]efendants will continue to refuse to honor the Board's levies in this regard. Accordingly, a declaration by this court of the parties' respective rights is required to fully and finally resolve this controversy." *Id.*, at 8–9.

In a prayer for relief, appellant requested damages for defendants' failure to honor the levies and a declaration that defendants are "legally obligated to honor all future levies by the Board." *Id.*, at 9.[5]

CLVT removed the case to the United States District Court for the Central District of California, and the court denied the Franchise Tax Board's motion for remand to the state court. On the merits, the District Court ruled that ERISA did not pre-empt the State's power to levy on funds held in trust by CLVT. CLVT appealed, and the Court of Appeals reversed. 679 F. 2d 1307 (CA9 1982). On petition for rehearing, the Franchise Tax Board renewed its argument that the District Court lacked jurisdiction over the complaint in this case. The petition for rehearing was denied, and an appeal was taken to this Court. We postponed consideration of our jurisdiction pending argument on the merits. 459 U. S. 1085 (1982). We now hold that this case was not within the removal jurisdiction conferred by 28 U. S. C. § 1441, and therefore we do not reach the merits of the preemption question.[6]

II

The jurisdictional structure at issue in this case has remained basically unchanged for the past century. With exceptions not relevant here, "any civil action brought in a

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[5] The complaint does not identify statutory authority for the relief requested; indeed, the only statute mentioned on the face of the complaint is ERISA. See *infra*, at 13.

[6] At least for purposes of determining whether the courts below had jurisdiction over this case, we have appellate jurisdiction under 28 U. S. C. § 1254(2).

State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." *Ibid.* If it appears before final judgment that a case was not properly removed, because it was not within the original jurisdiction of the United States district courts, the district court must remand it to the state court from which it was removed. See 28 U. S. C. § 1447(c). For this case—as for many cases where there is no diversity of citizenship between the parties—the propriety of removal turns on whether the case falls within the original "federal question" jurisdiction of the United States district courts: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U. S. C. § 1331 (1976 ed., Supp. V).[7]

Since the first version of § 1331 was enacted, Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, the statutory phrase "arising under the Constitution, laws, or treaties of the United States" has resisted all attempts to frame a single, precise definition for determining which cases fall within, and which cases fall outside, the original jurisdiction of the district courts. Especially when considered in light of § 1441's removal jurisdiction, the phrase "arising under" masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.[8]

The most familiar definition of the statutory "arising under" limitation is Justice Holmes' statement, "A suit arises under the law that creates the cause of action." *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U. S. 257, 260 (1916). However, it is well settled that Justice Holmes' test is more useful for describing the vast majority of cases that come within the district courts' original jurisdiction than it is for describing which cases are beyond district court jurisdiction. We have often held that a case "arose under" federal law where the vindication of a right under state law necessarily turned on some construction of federal law, see, *e. g.*, *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180 (1921); *Hopkins* v. *Walker*, 244 U. S. 486 (1917), and even the most ardent proponent of the Holmes test has admitted that it has been rejected as an exclusionary principle, see *Flournoy* v. *Wiener*, 321 U. S. 253, 270–272 (1944) (Frankfurter, J., dissenting). See also *T. B. Harms Co.* v. *Eliscu*, 339 F. 2d 823, 827 (CA2 1964) (Friendly, J.). Leading commentators have suggested that for purposes of § 1331 an action "arises under" federal law "if in order for the plaintiff to secure the relief sought he will be obliged to establish both the correctness and the applicability to his case of a proposition of federal law." P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 889 (2d ed. 1973) (hereinafter Hart & Wechsler); cf. *T. B. Harms Co.*, *supra*, at 827 ("a case may 'arise under' a law of the United States if the complaint discloses a need for determining the meaning or application of such a law").

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[7] ERISA may also be an "Act of Congress regulating commerce" within the meaning of 28 U. S. C. § 1337 (1976 ed., Supp. V), but we have not distinguished between the "arising under" standards of § 1337 and § 1331. See, *e. g.*, *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667 (1950).

[8] The statute's "arising under" language tracks similar language in Art. III, § 2, of the Constitution, which has been construed as permitting Congress to extend federal jurisdiction to any case of which federal law potentially "forms an ingredient," see *Osborn* v. *Bank of United States*, 9 Wheat. 738, 823 (1824), and its limited legislative history suggests that the

One powerful doctrine has emerged, however—the "well-pleaded complaint" rule—which as a practical matter severely limits the number of cases in which state law "creates the cause of action" that may be initiated in or removed to

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44th Congress may have meant to "confer the whole power which the Constitution conferred," 2 Cong. Rec. 4986 (1874) (remarks of Sen. Carpenter). Nevertheless, we have only recently reaffirmed what has long been recognized—that "Art. III 'arising under' jurisdiction is broader than federal-question jurisdiction under § 1331." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 495 (1983).

federal district court, thereby avoiding more-or-less automatically a number of potentially serious federal-state conflicts.

> "[W]hether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Taylor* v. *Anderson*, 234 U. S. 74, 75–76 (1914).

Thus, a federal court does not have original jurisdiction over a case in which the complaint presents a state-law cause of action, but also asserts that federal law deprives the defendant of a defense he may raise, *Taylor* v. *Anderson, supra; Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149 (1908), or that a federal defense the defendant may raise is not sufficient to defeat the claim, *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454 (1894). "Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution." *Louisville & Nashville R. Co.* v. *Mottley, supra*, at 152. For better or worse, under the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless the *plaintiff's* complaint establishes that the case "arises under" federal law.[9] "[A] right or immunity created by the

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[9] The well-pleaded complaint rule applies to the original jurisdiction of the district courts as well as to their removal jurisdiction. See *Phillips Petroleum Co.* v. *Texaco Inc.*, 415 U. S. 125, 127 (1974) *(per curiam)* (case brought originally in federal court); *Pan American Petroleum Corp.* v. *Superior Court*, 366 U. S. 656, 663 (1961) (attack on jurisdiction of state court).

It is possible to conceive of a rational jurisdictional system in which the answer as well as the complaint would be consulted before a determination was made whether the case "arose under" federal law, or in which original and removal jurisdiction were not coextensive. Indeed, until the 1887

Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully* v. *First National Bank in Meridian*, 299 U. S. 109, 112 (1936).

For many cases in which federal law becomes relevant only insofar as it sets bounds for the operation of state authority, the well-pleaded complaint rule makes sense as a quick rule of thumb. Describing the case before the Court in *Gully*,[10] Justice Cardozo wrote:

> "Petitioner will have to prove that the state law has been obeyed before the question will be reached whether anything in its provisions or in administrative conduct under it is inconsistent with the federal rule. If what was done by the taxing officers in levying the tax in suit did not amount in substance under the law of Mississippi to an assessment of the shareholders, but in substance as

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amendments to the 1875 Act, Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, as amended by Act of Aug. 13, 1888, ch. 866, 25 Stat. 433, the well-pleaded complaint rule was not applied in full force to cases removed from state court; the defendant's petition for removal could furnish the necessary guarantee that the case necessarily presented a substantial question of federal law. See *Railroad Co.* v. *Mississippi*, 102 U. S. 135, 140 (1880); *Gold-Washing & Water Co.* v. *Keyes*, 96 U. S. 199, 203–204 (1878). Commentators have repeatedly proposed that some mechanism be established to permit removal of cases in which a federal defense may be dispositive. See, *e. g.*, American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts § 1312, pp. 188–194 (1969) (ALI Study); Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216, 233–234 (1948). But those proposals have not been adopted.

[10] *Gully* was a suit by Mississippi tax authorities, claiming that the First National Bank had failed to make good on a contract with its predecessor corporation whereby, according to the State, the bank had promised to pay the predecessor's tax liabilities. 299 U. S., at 111–112. It had been removed to federal court, and the motion for remand had been defeated, on the ground that the State's "power to lay a tax upon the shares of national banks has its origin and measure in the provisions of a federal statute" and that "by necessary implication a plaintiff counts upon the statute in suing for the tax." *Id.*, at 112.

> well as in form was an assessment of the bank alone, the conclusion will be inescapable that there was neither tax nor debt, apart from any barriers Congress may have built. On the other hand, a finding upon evidence that the Mississippi law has been obeyed may compose the controversy altogether, leaving no room for a contention that the federal law has been infringed. The most that one can say is that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in our federal form of government. A dispute so doubtful and conjectural, so far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states." *Id.*, at 117.

The rule, however, may produce awkward results, especially in cases in which neither the obligation created by state law nor the defendant's factual failure to comply are in dispute, and both parties admit that the only question for decision is raised by a federal pre-emption defense. Nevertheless, it has been correctly understood to apply in such situations.[11] As we said in *Gully:* "By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby." *Id.*, at 116.[12]

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[11] *E. g., Trent Realty Associates* v. *First Federal Savings & Loan Assn.*, 657 F. 2d 29, 34–35 (CA3 1981); *First National Bank of Aberdeen* v. *Aberdeen National Bank*, 627 F. 2d 843, 850–852 (CA8 1980); *Washington* v. *American League of Professional Baseball Clubs*, 460 F. 2d 654, 660 (CA9 1972); cf. *First Federal Savings & Loan Assn. of Boston* v. *Greenwald*, 591 F. 2d 417, 422–423 (CA1 1979).

[12] Note, however, that a claim of federal pre-emption does not always arise as a defense to a coercive action. See n. 20, *infra*. And, of course, the absence of original jurisdiction does not mean that there is no federal forum in which a pre-emption defense may be heard. If the state courts reject a claim of federal pre-emption, that decision may ultimately be reviewed on appeal by this Court. See, *e. g., Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141 (1982) (deciding pre-emption question at issue in *Trent Realty, supra*).

III

Simply to state these principles is not to apply them to the case at hand. Appellant's complaint sets forth two "causes of action," one of which expressly refers to ERISA; if either comes within the original jurisdiction of the federal courts, removal was proper as to the whole case. See 28 U. S. C. § 1441(c). Although appellant's complaint does not specifically assert any particular statutory entitlement for the relief it seeks, the language of the complaint suggests (and the parties do not dispute) that appellant's "first cause of action" states a claim under Cal. Rev. & Tax. Code Ann. § 18818 (West Supp. 1983), see *supra,* at 5–6, and its "second cause of action" states a claim under California's Declaratory Judgment Act, Cal. Civ. Proc. Code Ann. § 1060 (West 1980). As an initial proposition, then, the "law that creates the cause of action" is state law, and original federal jurisdiction is unavailable unless it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, or that one or the other claim is "really" one of federal law.

A

Even though state law creates appellant's causes of action, its case might still "arise under" the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties. For appellant's first cause of action—to enforce its levy, under § 18818—a straightforward application of the well-pleaded complaint rule precludes original federal-court jurisdiction. California law establishes a set of conditions, without reference to federal law, under which a tax levy may be enforced; federal law becomes relevant only by way of a defense to an obligation created entirely by state law, and then only if appellant has made out a valid claim for relief under state law. See *supra,* at 11–12. The well-pleaded complaint rule was framed to deal with precisely such a situation. As we discuss above, since 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.

Appellant's declaratory judgment action poses a more difficult problem. Whereas the question of federal pre-emption is relevant to appellant's first cause of action only as a potential defense, it is a necessary element of the declaratory judgment claim. Under Cal. Civ. Proc. Code Ann. § 1060 (West 1980), a party with an interest in property may bring an action for a declaration of another party's legal rights and duties with respect to that property upon showing that there is an "actual controversy relating to the legal rights and duties" of the parties. The only questions in dispute between the parties in this case concern the rights and duties of CLVT and its trustees under ERISA. Not only does appellant's request for a declaratory judgment under California law clearly encompass questions governed by ERISA, but appellant's complaint identifies no other questions as a subject of controversy between the parties. Such questions must be raised in a well-pleaded complaint for a declaratory judgment.[13] Therefore, it is clear on the face of its well-pleaded complaint that appellant may not obtain the relief it seeks in its second cause of action ("[t]hat the court declare defendants legally obligated to honor all future levies by the Board upon [CLVT]," App. 9) without a construction of ERISA and/or an adjudication of its pre-emptive effect and constitutionality—all questions of federal law.

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[13] To obtain declaratory relief in California, a party must plead "facts showing the existence of an actual controversy relating to the legal rights and duties of the parties." *Wellenkamp* v. *Bank of America*, 21 Cal. 3d 943, 947, 582 P. 2d 970, 972 (1978).

Appellant argues that original federal-court jurisdiction over such a complaint is foreclosed by our decision in *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667 (1950). As we shall see, however, *Skelly Oil* is not directly controlling.

In *Skelly Oil*, Skelly Oil and Phillips had a contract, for the sale of natural gas, that entitled the seller—Skelly Oil—to terminate the contract at any time after December 1, 1946, if the Federal Power Commission had not yet issued a certificate of convenience and necessity to a third party, a pipeline company to whom Phillips intended to resell the gas purchased from Skelly Oil. Their dispute began when the Federal Power Commission informed the pipeline company on November 30 that it would issue a conditional certificate, but did not make its order public until December 2. By this time Skelly Oil had notified Phillips of its decision to terminate their contract. Phillips brought an action in United States District Court under the federal Declaratory Judgment Act, 28 U. S. C. § 2201, seeking a declaration that the contract was still in effect. 339 U. S., at 669–671.

There was no diversity between the parties, and we held that Phillips' claim was not within the federal-question jurisdiction conferred by § 1331. We reasoned:

> "'[T]he operation of the Declaratory Judgment Act is procedural only.' *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240. Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction. When concerned as we are with the power of the inferior federal courts to entertain litigation within the restricted area to which the Constitution and Acts of Congress confine them, 'jurisdiction' means the kinds of issues which give right of entrance to federal courts. Jurisdiction in this sense was not altered by the Declaratory Judgment Act. Prior to that Act, a federal court would entertain a suit on a contract only if the plaintiff asked for an immediately enforceable remedy

> like money damages or an injunction, but such relief could only be given if the requisites of jurisdiction, in the sense of a federal right or diversity, provided foundation for resort to the federal courts. The Declaratory Judgment Act allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked. But the requirements of jurisdiction—the limited subject matters which alone Congress had authorized the District Courts to adjudicate—were not impliedly repealed or modified." 339 U. S., at 671–672.

We then observed that, under the well-pleaded complaint rule, an action by Phillips to enforce its contract would not present a federal question. *Id.*, at 672. *Skelly Oil* has come to stand for the proposition that "if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking." 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2767, pp. 744–745 (2d ed. 1983). Cf. *Public Service Comm'n of Utah* v. *Wycoff Co.*, 344 U. S. 237, 248 (1952) (dictum).[14]

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[14] In *Wycoff Co.*, a company that transported films between various points within the State of Utah sought a declaratory judgment that a state regulatory commission had no power to forbid it to transport over routes authorized by the Interstate Commerce Commission. However, "[i]t offered no evidence whatever of any past, pending or threatened action by the Utah Commission." 344 U. S., at 240. We held that there was no jurisdiction, essentially because the dispute had "not matured to a point where we can see what, if any, concrete controversy will develop." *Id.*, at 245. We also added:

"Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establish-

1. As an initial matter, we must decide whether the doctrine of *Skelly Oil* limits original federal-court jurisdiction under § 1331—and by extension removal jurisdiction under § 1441—when a question of federal law appears on the face of a well-pleaded complaint for a state-law declaratory judgment. Apparently, it is a question of first impression.[15] As the passage quoted above makes clear, *Skelly Oil* relied significantly on the precise contours of the federal Declaratory Judgment Act as well as of § 1331. Cf. 339 U. S., at 674 (stressing the need to respect "the limited procedural purpose of the Declaratory Judgment Act"). The Court's emphasis that the Declaratory Judgment Act was intended to affect only the remedies available in a federal district court, not the court's jurisdiction, was critical to the Court's reasoning. Our interpretation of the federal Declaratory Judgment Act in *Skelly Oil* does not apply of its own force to *state* declaratory judgment statutes, many of which antedate the federal statute, see Developments in the Law—Declaratory Judgments—1941–1949, 62 Harv. L. Rev. 787, 790–791 (1949).[16] Cf. *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288

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ing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law." *Id.*, at 248.

[15] The existence of this question was noted by the leading proponent of declaratory judgments during the interim between this Court's first indication that state declaratory judgment actions did not fall outside Art. III's "case or controversy" limitation and passage of the federal Declaratory Judgment Act, but the issue did not come before us. See E. Borchard, Declaratory Judgments 298–300 (1934).

[16] California's Declaratory Judgment Act was enacted 13 years before the federal Act. See ch. 463, § 1, 1921 Cal. Stats. 689. California may well regard its statute as having a more substantive purpose than the federal Act as interpreted in *Skelly Oil*. According to the leading commentator on California procedure: "Declaratory relief is not a special proceeding. It is an action, classified as equitable by reason of the type of relief offered . . . ." 3 B. Witkin, California Procedure § 705(c), p. 2329 (2d

U. S. 249, 264–265 (1933) (Supreme Court appellate jurisdiction over federal questions in a state declaratory judgment).

Yet while *Skelly Oil* itself is limited to the federal Declaratory Judgment Act, fidelity to its spirit leads us to extend it to state declaratory judgment actions as well. If federal district courts could take jurisdiction, either originally or by removal, of state declaratory judgment claims raising questions of federal law, without regard to the doctrine of *Skelly Oil*, the federal Declaratory Judgment Act—with the limitations *Skelly Oil* read into it—would become a dead letter. For any case in which a state declaratory judgment action was available, litigants could get into federal court for a declaratory judgment despite our interpretation of § 2201, simply by pleading an adequate state claim for a declaration of federal law. Having interpreted the Declaratory Judgment Act of 1934 to include certain limitations on the jurisdiction of federal district courts to entertain declaratory judgment suits, we should be extremely hesitant to interpret the Judiciary Act of 1875 and its 1887 amendments in a way that renders the limitations in the later statute nugatory. Therefore, we hold that under the jurisdictional statutes as they now stand[17]

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ed. 1971). See also *Adams* v. *Cook*, 15 Cal. 2d 352, 362, 101 P. 2d 484, 489 (1940); cf. *Mefford* v. *Tulare*, 102 Cal. App. 2d 919, 922, 228 P. 2d 847, 849 (1951) (declaratory judgment is intended "to liquidate uncertainties and controversies"). But cf. *Western Title Guaranty Co.* v. *Sacramento & San Joaquin Drainage Dist.*, 235 Cal. App. 2d 815, 822, 45 Cal. Rptr. 578, 582 (1965) (citing federal cases).

[17] It is not beyond the power of Congress to confer a right to a declaratory judgment in a case or controversy arising under federal law—within the meaning of the Constitution or of § 1331—without regard to *Skelly Oil*'s particular application of the well-pleaded complaint rule. The 1969 ALI report strongly criticized the *Skelly Oil* doctrine: "If no other changes were to be made in federal question jurisdiction, it is arguable that such language, and the historical test it seems to embody, should be repudiated." ALI Study § 1311, at 170–171. Nevertheless, Congress has declined to make such a change. At this point, any adjustment in the system that has evolved under the *Skelly Oil* rule must come from Congress.

federal courts do not have original jurisdiction, nor do they acquire jurisdiction on removal, when a federal question is presented by a complaint for a state declaratory judgment, but *Skelly Oil* would bar jurisdiction if the plaintiff had sought a federal declaratory judgment.

2. The question, then, is whether a federal district court could take jurisdiction of appellant's declaratory judgment claim had it been brought under 28 U. S. C. § 2201.[18] The application of *Skelly Oil* to such a suit is somewhat unclear. Federal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question.[19] Section 502(a)(3) of ERISA specifically grants trustees of ERISA-covered plans like CLVT a cause of action for

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[18] It may seem odd that, for purposes of determining whether removal was proper, we analyze a claim brought under state law, in state court, by a party who has continuously objected to district court jurisdiction over its case, as if that party had been trying to get original federal-court jurisdiction all along. That irony, however, is a more-or-less constant feature of the removal statute, under which a case is removable if a federal district court could have taken jurisdiction had the same complaint been filed. See Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216, 234 (1948).

[19] For instance, federal courts have consistently adjudicated suits by alleged patent infringers to declare a patent invalid, on the theory that an infringement suit by the declaratory judgment defendant would raise a federal question over which the federal courts have exclusive jurisdiction. See *E. Edelmann & Co.* v. *Triple-A Specialty Co.*, 88 F. 2d 852 (CA7 1937); Hart & Wechsler 896–897. Taking jurisdiction over this type of suit is consistent with the dictum in *Public Service Comm'n of Utah* v. *Wycoff Co.*, 344 U. S. 237, 248 (1952), see n. 14, *supra*, in which we stated only that a declaratory judgment plaintiff could not get original federal jurisdiction if the anticipated lawsuit by the declaratory judgment defendant would *not* "arise under" federal law. It is also consistent with the nature of the declaratory remedy itself, which was designed to permit adjudication of either party's claims of right. See E. Borchard, Declaratory Judgments 15–18, 23–25 (1934).

injunctive relief when their rights and duties under ERISA are at issue, and that action is exclusively governed by federal law.[20] If CLVT could have sought an injunction under ERISA against application to it of state regulations that require acts inconsistent with ERISA,[21] does a declaratory judgment suit by the State "arise under" federal law?

We think not. We have always interpreted what *Skelly Oil* called "the current of jurisdictional legislation since the Act of March 3, 1875," 339 U. S., at 673, with an eye to practicality and necessity. "What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation . . . a selective process which picks the substantial causes out of the web and lays the other ones aside." *Gully* v. *First National Bank in Meridian*, 299 U. S., at 117-118. There are good reasons why the federal courts should not entertain suits by the States to declare the validity of their regulations despite possibly conflicting federal law. States are not significantly prejudiced by an inability to come to federal court for a declaratory judgment in advance of a possible injunctive suit by a person subject to federal regulation. They have a variety of means by which they can enforce their own laws in their own courts, and they do not suffer if the pre-emption questions such enforcement may raise are tested there.[22] The express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties, see *infra*, at 25, as to whom Congress presumably determined that a right to enter federal court was necessary to further the statute's purposes.[23] It did not go so far as to provide that any suit *against* such parties must also be brought in federal court when they themselves did not choose to sue. The situation presented by a State's suit for a declaration of the validity of state law is sufficiently removed from the spirit of necessity and careful limitation of district court jurisdiction that informed our statutory interpretation in *Skelly Oil* and *Gully* to convince us that, until Congress informs us otherwise, such a suit is not within the original jurisdiction of the United States district courts. Accordingly, the same suit brought originally in state court is not removable either.[24]

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[20] Section 502(a)(3) provides:

"[A civil action may be brought] by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter . . . ." 29 U. S. C. § 1132(a)(3).

See also n. 26, *infra* (federal jurisdiction over suits under § 502 is exclusive, and they are governed entirely by federal common law).

Even if ERISA did not expressly provide jurisdiction, CLVT might have been able to obtain federal jurisdiction under the doctrine applied in some cases that a person subject to a scheme of federal regulation may sue in federal court to enjoin application to him of conflicting state regulations, and a declaratory judgment action by the same person does not necessarily run afoul of the *Skelly Oil* doctrine. See, *e. g.*, *Lake Carriers' Assn.* v. *MacMullan*, 406 U. S. 498, 506–508 (1972); *Rath Packing Co.* v. *Becker*, 530 F. 2d 1295, 1303–1306 (CA9 1975), aff'd *sub nom. Jones* v. *Rath Packing Co.*, 430 U. S. 519 (1977); *First Federal Savings & Loan Assn. of Boston* v. *Greenwald*, 591 F. 2d, at 423, and n. 8.

[21] We express no opinion, however, whether a party in CLVT's position could sue under ERISA to enjoin or to declare invalid a state tax levy, despite the Tax Injunction Act, 28 U. S. C. § 1341. See *California* v. *Grace Brethren Church*, 457 U. S. 393 (1982). To do so, it would have to show either that state law provided no "speedy and efficient remedy" or that Congress intended § 502 of ERISA to be an exception to the Tax Injunction Act.

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[22] Indeed, as appellant's strategy in this case shows, they may often be willing to go to great lengths to avoid federal-court resolution of a pre-emption question. Realistically, there is little prospect that States will flood the federal courts with declaratory judgment actions; most questions will arise, as in this case, because a State has sought a declaration in state court and the defendant has removed the case to federal court. Accordingly, it is perhaps appropriate to note that considerations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it.

[23] Cf. nn. 19 and 20, *supra*. Alleged patent infringers, for example, have a clear interest in swift resolution of the federal issue of patent validity—they are liable for damages if it turns out they are infringing a patent, and they frequently have a delicate network of contractual arrangements with third parties that is dependent on their right to sell or license a product. Parties subject to conflicting state and federal regulatory schemes also have a clear interest in sorting out the scope of each government's authority, especially where they face a threat of liability if the application of federal law is not quickly made clear.

B

CLVT also argues that appellant's "causes of action" are, in substance, federal claims. Although we have often repeated that "the party who brings a suit is master to decide what law he will rely upon," *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25 (1913), it is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint, see *Avco Corp.* v. *Aero Lodge No. 735, Int'l Assn. of Machinists*, 376 F. 2d 337, 339–340 (CA6 1967), aff'd, 390 U. S. 557 (1968).

CLVT's best argument stems from our decision in *Avco Corp.* v. *Aero Lodge No. 735*. In that case, the petitioner filed suit in state court alleging simply that it had a valid contract with the respondent, a union, under which the respondent had agreed to submit all grievances to binding arbitration and not to cause or sanction any "work stoppages, strikes, or slowdowns." The petitioner further alleged that the respondent and its officials had violated the agreement by participating in and sanctioning work stoppages, and it sought temporary and permanent injunctions against further breaches. App., O. T. 1967, No. 445, pp. 2–9. It was clear that, had petitioner invoked it, there would have been a federal cause of action under § 301 of the Labor Management Relations Act, 1947 (LMRA), 29 U. S. C. § 185, see *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957), and that, even in state court, any action to enforce an agreement within the scope of § 301 would be controlled by federal law, see *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95, 103–104 (1962). It was also clear, however, under the law in effect at the time, that independent limits on federal jurisdiction made it impossible for a federal court to grant the injunctive relief petitioner sought. See *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1962) (later overruled in *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970)).

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[24] CLVT suggests that we treat the motion to dismiss appellant's complaint it filed in the District Court as a counterclaim for a declaratory judgment under § 502 of ERISA, which might then provide an independent jurisdictional basis for reaching the merits of the pre-emption issue in this case. Brief for Appellees 9–11; see *First Federal Savings & Loan Assn. of Boston* v. *Greenwald, supra*, at 423; *Wong* v. *Bacon*, 445 F. Supp. 1177, 1183–1184 (ND Cal. 1977). Apparently, CLVT never filed an answer or a counterclaim in this case because it stipulated that the District Court could treat its motion to dismiss as a cross-motion for summary judgment, and the court decided the case on that basis. See App. to Juris. Statement 17 (District Court's "Findings of Fact and Conclusions of Law"). Under the circumstances, we decline to adopt such a broad construction of CLVT's pleadings.

The Court of Appeals held, 376 F. 2d, at 340, and we affirmed, 390 U. S., at 560, that the petitioner's action "arose under" § 301, and thus could be removed to federal court, although the petitioner had undoubtedly pleaded an adequate claim for relief under the state law of contracts and had sought a remedy available *only* under state law. The necessary ground of decision was that the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization."[25] Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law.

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[25] To similar effect is *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 677 (1974), in which we held that—unlike all other ejectment suits in which the plaintiff derives its claim from a federal grant, *e. g.*, *Taylor* v. *Anderson*, 234 U. S. 74 (1914)—an ejectment suit based on Indian title is within the original "federal question" jurisdiction of the district courts, because Indian title creates a federal possessory right to tribal lands, "wholly apart from the application of state law principles which normally and separately protect a valid right of possession." Cf. 414 U. S., at 682–683 (REHNQUIST, J., concurring).

CLVT argues by analogy that ERISA, like § 301, was meant to create a body of federal common law, and that "any state court action which would require the interpretation or application of ERISA to a plan document 'arises under' the laws of the United States." Brief for Appellees 20–21. ERISA contains provisions creating a series of express causes of action in favor of participants, beneficiaries, and fiduciaries of ERISA-covered plans, as well as the Secretary of Labor. § 502(a), 29 U. S. C. § 1132(a).[26] It may be that, as with § 301 as interpreted in *Avco*, any state action coming within the scope of § 502(a) of ERISA would be removable to federal district court, even if an otherwise adequate state cause of action were pleaded without reference to federal law.[27] It does not follow, however, that either of appellant's claims in this case comes within the scope of one of ERISA's causes of action.

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[26] The statute further states that "the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary," except for actions by a participant or beneficiary to recover benefits due, to enforce rights under the terms of a plan, or to clarify rights to future benefits, over which state courts have concurrent jurisdiction. § 502(e)(1), 29 U. S. C. § 1132(e)(1). In addition, ERISA's legislative history indicates that, in light of the Act's virtually unique pre-emption provision, see § 514, 29 U. S. C. § 1144, "a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits).

[27] Indeed, precedent involving other statutes granting exclusive jurisdiction to the federal courts suggests that, if such an action were not within the class of cases over which state and federal courts have concurrent jurisdiction, the proper course for a federal district court to take after removal would be to dismiss the case altogether, without reaching the merits. See, *e. g.*, *General Investment Co.* v. *Lake Shore & M. S. R. Co.*, 260 U. S. 261, 287–288 (1922); *Koppers Co.* v. *Continental Casualty Co.*, 337 F. 2d 499, 501–502 (CA8 1964) (Blackmun, J.).

The phrasing of § 502(a) is instructive. Section 502(a) specifies which persons—participants, beneficiaries, fiduciaries, or the Secretary of Labor—may bring actions for particular kinds of relief. It neither creates nor expressly denies any cause of action in favor of state governments, to enforce tax levies or for any other purpose. It does not purport to reach every question relating to plans covered by ERISA.[28] Furthermore, § 514(b)(2)(A) of ERISA, 29 U. S. C. § 1144(b)(2)(A), makes clear that Congress did not intend to pre-empt entirely every state cause of action relating to such plans. With important, but express limitations, it states that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities."

Against this background, it is clear that a suit by state tax authorities under a statute like § 18818 does not "arise under" ERISA. Unlike the contract rights at issue in *Avco*, the State's right to enforce its tax levies is not of central concern to the federal statute. For that reason, as in *Gully*, see *supra*, at 11–12, on the face of a well-pleaded complaint there are many reasons completely unrelated to the provisions and purposes of ERISA why the State may or may not be entitled to the relief it seeks.[29] Furthermore, ERISA does not provide an alternative cause of action in favor of the State to enforce its rights, while § 301 expressly supplied the plaintiff in *Avco* with a federal cause of action to replace its pre-empted state contract claim. Therefore, even though the Court of Appeals may well be correct that ERISA precludes enforcement of the State's levy in the circumstances of this case, an action to enforce the levy is not itself pre-empted by ERISA.

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[28] In contrast, § 301(a) of the LMRA applies to all "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations." We have not taken a restrictive view of *who* may sue under § 301 for violations of such contracts, see, *e. g., Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962); *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459 (1960); cf. *Nedd* v. *United Mine Workers*, 556 F. 2d 190, 196–198 (CA3 1977), or of what contracts are covered by § 301, see *Retail Clerks* v. *Lion Dry Goods, Inc.*, 369 U. S. 17 (1962). See also *Black-Clawson Co.* v. *Machinists Lodge 335*, 313 F. 2d 179, 181–182 (CA2 1962) (suit by employer for declaratory judgment as to contract obligations arises under § 301). But even under § 301 we have never intimated that any action merely relating to a contract within the coverage of § 301 arises exclusively under that section. For instance, a state battery suit growing out of a violent strike would not arise under § 301 simply because the strike may have been a violation of an employer-union contract. Cf. *Automobile Workers* v. *Russell*, 356 U. S. 634, 640–642 (1958).

Once again, appellant's declaratory judgment cause of action presents a somewhat more difficult issue. The question on which a declaration is sought—that of the CLVT trustees' "power to honor the levies made upon them by the State of California," see *supra*, at 6—is undoubtedly a matter of concern under ERISA. It involves the meaning and enforceability of provisions in CLVT's trust agreement forbidding the trustees to assign or otherwise to alienate funds held in trust, see *supra*, at 4–5, and n. 3, and thus comes within the class of questions for which Congress intended that federal courts create federal common law.[30] Under § 502(a)(3)(B) of

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[29] In theory (looking only at the complaint), it may turn out that the levy was improper under state law, or that in fact the defendant had complied with the levy. Cf. *Gully* v. *First National Bank in Meridian*, 299 U. S. 109, 117 (1936). Furthermore, a levy on CLVT might be for something like property taxes on real estate it owned. CLVT's trust agreement authorizes its trustees to pay such taxes. Art. V, ¶ 5.21(k), App. 29.

[30] See *supra*, at 24, n. 26. Of course, in suggesting that the trustees' power to comply with a state tax levy is—as a subset of the trustees' general duties with respect to CLVT—a matter of concern under ERISA, we express no opinion as to whether ERISA forbids the trustees to comply with the levies in this case or otherwise pre-empts the State's power to levy on funds held in trust. The same is true of our holding that ERISA does not pre-empt the State's causes of action entirely. Merely to hold

ERISA, a participant, beneficiary, or fiduciary of a plan covered by ERISA may bring a declaratory judgment action in federal court to determine whether the plan's trustees may comply with a state levy on funds held in trust.[31] Nevertheless, CLVT's argument that appellant's second cause of action arises under ERISA fails for the second reason given above. ERISA carefully enumerates the parties entitled to seek relief under § 502; it does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action for a declaratory judgment on the issues in this case. A suit for similar relief by some other party does not "arise under" that provision.[32]

IV

Our concern in this case is consistent application of a system of statutes conferring original federal-court jurisdiction, as they have been interpreted by this Court over many years. Under our interpretations, Congress has given the lower federal courts jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates

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that ERISA does not have the same effect on appellant's suit in this case that § 301 of the LMRA had on the petitioner's contract suit in *Avco* is not to prejudge the merits of CLVT's pre-emption claim.

[31] See n. 19, *supra*. Section 502(a)(3)(B) of ERISA has been interpreted as creating a cause of action for a declaratory judgment. See *Cutaiar* v. *Marshall*, 590 F. 2d 523, 527 (CA3 1979). We repeat, however, the caveat expressed in n. 21, *supra*, as to the effect of the Tax Injunction Act.

[32] CLVT also argues that this case is directly controlled by *Avco*, on the theory that CLVT's trust agreement is a contract covered by § 301 of the LMRA itself. Brief for Appellees 19, n. 19. We reject this argument essentially for the reasons given in n. 28, *supra*. In this case, the State does not rely on any contract within the scope of § 301. The connection between appellant's causes of action to enforce its levy and for a declaration of rights and duties and a suit to enforce the trust agreement is too attenuated for us to say that either "arises under" § 301.

the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law. We hold that a suit by state tax authorities both to enforce its levies against funds held in trust pursuant to an ERISA-covered employee benefit plan, and to declare the validity of the levies notwithstanding ERISA, is neither a creature of ERISA itself nor a suit of which the federal courts will take jurisdiction because it turns on a question of federal law. Accordingly, we vacate the judgment of the Court of Appeals and remand so that this case may be remanded to the Superior Court of the State of California for the County of Los Angeles.

It is so ordered.

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., ET AL. *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82–354. Argued April 26, 1983—Decided June 24, 1983*

The National Traffic and Motor Vehicle Safety Act of 1966 (Act) directs the Secretary of Transportation to issue motor vehicle safety standards that "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." In issuing these standards, the Secretary is directed to consider "relevant available motor vehicle safety data," whether the proposed standard is "reasonable, practicable and appropriate" for the particular type of motor vehicle for which it is prescribed, and "the extent to which such standards will contribute to carrying out the purposes" of the Act. The Act authorizes judicial review, under the Administrative Procedure Act, of "all orders establishing, amending, or revoking" a motor vehicle safety standard. The National Highway Traffic Safety Administration (NHTSA), to which the Secretary has delegated his authority to promulgate safety standards, rescinded the requirement of Modified Standard 208 that new motor vehicles produced after September 1982 be equipped with passive restraints (automatic seatbelts or airbags) to protect the safety of the occupants of the vehicle in the event of a collision. In explaining the rescission, NHTSA maintained that it was no longer able to find, as it had in 1977 when Modified Standard 208 was issued, that the automatic restraint requirement would produce significant safety benefits. In 1977, NHTSA had assumed that airbags would be installed in 60% of all new cars and automatic seatbelts in 40%. But by 1981 it became apparent that automobile manufacturers planned to install automatic seatbelts in approximately 99% of the new cars and that the overwhelming majority of such seatbelts could be easily detached and left that way permanently, thus precluding the realization of the lifesaving potential of airbags and requiring the same type of affirmative action that was the stumbling block

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*Together with No. 82–355, *Consumer Alert et al.* v. *State Farm Mutual Automobile Insurance Co. et al.*; and No. 82–398, *United States Department of Transportation et al.* v. *State Farm Mutual Automobile Insurance Co. et al.*, also on certiorari to the same court.

to achieving high usage of manual belts. For this reason, NHTSA concluded that there was no longer a basis for reliably predicting that Modified Standard 208 would lead to any significant increased usage of restraints. Hence, in NHTSA's view, the automatic restraint requirement was no longer reasonable or practicable. Moreover, given the high expense of implementing such a requirement and the limited benefits arising therefrom, NHTSA feared that many consumers would regard Modified Standard 208 as an instance of ineffective regulation. On petitions for review of NHTSA's rescission of the passive restraint requirement, the Court of Appeals held that the rescission was arbitrary and capricious on the grounds that NHTSA's conclusion that it could not reliably predict an increase in belt usage under the Standard was an insufficient basis for the rescission, that NHTSA inadequately considered the possibility of requiring manufacturers to install nondetachable rather than detachable passive belts, and that the agency failed to give any consideration to requiring compliance with the Standard by the installation of airbags. The court found that congressional reaction to various versions of the Standard "raised doubts" that NHTSA's rescission "necessarily demonstrates an effort to fulfill its statutory mandate" and that therefore the agency was obligated to provide "increasingly clear and convincing reasons" for its action.

Held: NHTSA's rescission of the passive restraint requirement in Modified Standard 208 was arbitrary and capricious; the agency failed to present an adequate basis and explanation for rescinding the requirement and must either consider the matter further or adhere to or amend the Standard along lines which its analysis supports. Pp. 40–57.

(a) The rescission of an occupant crash protection standard is subject to the same standard of judicial review—the "arbitrary and capricious" standard—as is the promulgation of such a standard, and should not be judged by, as petitioner Motor Vehicle Manufacturers Association contends, the standard used to judge an agency's refusal to promulgate a rule in the first place. The Act expressly equates orders "revoking" and "establishing" safety standards. The Association's view would render meaningless Congress' authorization for judicial review of orders revoking safety standards. An agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance. While the scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency, the agency nevertheless must examine the relevant data and articulate a satisfactory explanation for its action. In reviewing that explanation, a court must consider whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment. Pp. 40–44.

(b) The Court of Appeals correctly found that the "arbitrary and capricious" standard of judicial review applied to rescission of agency regulations, but erred in intensifying the scope of its review based upon its reading of legislative events. While an agency's interpretation of a statute may be confirmed or ratified by subsequent congressional failure to change that interpretation, here, even an unequivocal ratification of the passive restraint requirement would not connote approval or disapproval of NHTSA's later decision to rescind the requirement. That decision remains subject to the "arbitrary and capricious" standard. Pp. 44–46.

(c) The first reason for finding NHTSA's rescission of Modified Standard 208 was arbitrary and capricious is that it apparently gave no consideration to modifying the Standard to require that airbag technology be utilized. Even if NHTSA's conclusion that detachable automatic seatbelts will not attain anticipated safety benefits because so many individuals will detach the mechanism were acceptable in its entirety, standing alone it would not justify any more than an amendment of the Standard to disallow compliance by means of one technology which will not provide effective passenger protection. It does not cast doubt on the need for a passive restraint requirement or upon the efficacy of airbag technology. The airbag is more than a policy alternative to the passive restraint requirement; it is a technology alternative within the ambit of the existing standard. Pp. 46–51.

(d) NHTSA was too quick to dismiss the safety benefits of automatic seatbelts. Its explanation for rescission of the passive restraint requirement is not sufficient to enable this Court to conclude that the rescission was the product of reasoned decisionmaking. The agency took no account of the critical difference between detachable automatic seatbelts and current manual seatbelts, failed to articulate a basis for not requiring nondetachable belts, and thus failed to offer the rational connection between facts and judgment required to pass muster under the "arbitrary and capricious" standard. Pp. 51–57.

220 U. S. App. D. C. 170, 680 F. 2d 206, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined, and in all but Parts V–B and VI of which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. REHNQUIST, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., and POWELL and O'CONNOR, JJ., joined, *post*, p. 57.

Solicitor General Lee argued the cause for petitioners in No. 82-398. With him on the briefs were *Assistant Attorney General McGrath, Deputy Solicitor General Geller, Edwin S. Kneedler, Robert E. Kopp, Michael F. Hertz, Frank Berndt, David W. Allen, Enid Rubenstein,* and *Eileen T. Leahy*. *Lloyd N. Cutler* argued the cause for petitioners in No. 82-354. With him on the briefs were *John H. Pickering, William R. Perlik, Andrew B. Weissman, William R. Richardson, Jr., Milton D. Andrews, Lance E. Tunick, William H. Crabtree, Edward P. Good, Henry R. Nolte, Jr., Otis M. Smith, Charles R. Sharp,* and *William L. Weber, Jr. Raymond M. Momboisse, Sam Kazman,* and *Ronald A. Zumbrun* filed briefs for petitioners in No. 82-355.

James F. Fitzpatrick argued the cause for respondents in all cases. With him on the brief for respondents State Farm Mutual Automobile Insurance Co. et al. were *Michael N. Sohn, John M. Quinn,* and *Merrick B. Garland. Robert Abrams,* Attorney General of New York, *Robert S. Hammer,* Assistant Attorney General, *Peter H. Schiff, Martin Minkowitz,* and *Milton L. Freedman* filed a brief for respondent Superintendent of Insurance of the State of New York. *Raymond J. Rasenberger, Lawrence C. Merthan, Jerry W. Cox,* and *Lowell R. Beck* filed a brief for respondents National Association of Independent Insurers et al.†

JUSTICE WHITE delivered the opinion of the Court.

The development of the automobile gave Americans unprecedented freedom to travel, but exacted a high price for enhanced mobility. Since 1929, motor vehicles have been the leading cause of accidental deaths and injuries in the United States. In 1982, 46,300 Americans died in motor vehicle accidents and hundreds of thousands more were maimed and injured.[1] While a consensus exists that the current loss of life on our highways is unacceptably high, improving safety does not admit to easy solution. In 1966, Congress decided that at least part of the answer lies in improving the design and safety features of the vehicle itself.[2] But much of the technology for building safer cars was undeveloped or untested. Before changes in automobile design could be mandated, the effectiveness of these changes had to be studied, their costs examined, and public acceptance considered. This task called for considerable expertise and Congress responded by enacting the National Traffic and Motor Vehicle Safety Act of 1966 (Act), 80 Stat. 718, as amended, 15 U. S. C. § 1381 *et seq.* (1976 ed. and Supp. V). The Act, created for the purpose of "reduc[ing] traffic accidents and deaths and injuries to persons resulting from traffic accidents," 15 U. S. C. § 1381, directs the Secretary of Transportation or his delegate to issue motor vehicle safety standards that "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." 15 U. S. C. § 1392(a) (1976 ed., Supp. V). In issuing these standards, the Secretary is directed to consider "relevant available motor vehicle safety data," whether the proposed standard "is reasonable, practicable and appropriate" for the particular type of motor vehicle, and the "extent to which such standards will contribute to carrying out the purposes" of the Act. 15 U. S. C. §§ 1392(f)(1), (3), (4).[3]

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†Briefs of *amici curiae* urging affirmance were filed by *Dennis J. Barbour* for the American College of Preventive Medicine et al.; by *Nathan Lewin* for the American Insurance Association; by *Philip R. Collins* and *Thomas C. McGrath, Jr.,* for the Automotive Occupant Protection Association; by *Alexandra K. Finucane* for the Epilepsy Foundation of America et al.; by *Katherine I. Hall* for the Center for Auto Safety et al.; by *Simon Lazarus III* for Mothers Against Drunk Drivers; and by *John H. Quinn, Jr.,* and *John Hardin Young* for the National Association of Insurance Commissioners.

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[1] National Safety Council, 1982 Motor Vehicle Deaths By States (May 16, 1983).

[2] The Senate Committee on Commerce reported:

"The promotion of motor vehicle safety through voluntary standards has largely failed. The unconditional imposition of mandatory standards at the earliest practicable date is the only course commensurate with the highway death and injury toll." S. Rep. No. 1301, 89th Cong., 2d Sess., 4 (1966).

The Act also authorizes judicial review under the provisions of the Administrative Procedure Act (APA), 5 U. S. C. § 706, of all "orders establishing, amending, or revoking a Federal motor vehicle safety standard," 15 U. S. C. § 1392(b). Under this authority, we review today whether NHTSA acted arbitrarily and capriciously in revoking the requirement in Motor Vehicle Safety Standard 208 that new motor vehicles produced after September 1982 be equipped with passive restraints to protect the safety of the occupants of the vehicle in the event of a collision. Briefly summarized, we hold that the agency failed to present an adequate basis and explanation for rescinding the passive restraint requirement and that the agency must either consider the matter further or adhere to or amend Standard 208 along lines which its analysis supports.

I

The regulation whose rescission is at issue bears a complex and convoluted history. Over the course of approximately 60 rulemaking notices, the requirement has been imposed, amended, rescinded, reimposed, and now rescinded again.

As originally issued by the Department of Transportation in 1967, Standard 208 simply required the installation of seatbelts in all automobiles. 32 Fed. Reg. 2415. It soon became apparent that the level of seatbelt use was too low to reduce traffic injuries to an acceptable level. The Department therefore began consideration of "passive occupant restraint systems"—devices that do not depend for their effectiveness upon any action taken by the occupant except that necessary to operate the vehicle. Two types of automatic crash protection emerged: automatic seatbelts and airbags. The automatic seatbelt is a traditional safety belt, which when fastened to the interior of the door remains attached without impeding entry or exit from the vehicle, and deploys automatically without any action on the part of the passenger. The airbag is an inflatable device concealed in the dashboard and steering column. It automatically inflates when a sensor indicates that deceleration forces from an accident have exceeded a preset minimum, then rapidly deflates to dissipate those forces. The lifesaving potential of these devices was immediately recognized, and in 1977, after substantial on-the-road experience with both devices, it was estimated by NHTSA that passive restraints could prevent approximately 12,000 deaths and over 100,000 serious injuries annually. 42 Fed. Reg. 34298.

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[3] The Secretary's general authority to promulgate safety standards under the Act has been delegated to the Administrator of the National Highway Traffic Safety Administration (NHTSA). 49 CFR § 1.50(a) (1982). This opinion will use the terms NHTSA and agency interchangeably when referring to the National Highway Traffic Safety Administration, the Department of Transportation, and the Secretary of Transportation.

In 1969, the Department formally proposed a standard requiring the installation of passive restraints, 34 Fed. Reg. 11148, thereby commencing a lengthy series of proceedings. In 1970, the agency revised Standard 208 to include passive protection requirements, 35 Fed. Reg. 16927, and in 1972, the agency amended the Standard to require full passive protection for all front seat occupants of vehicles manufactured after August 15, 1975. 37 Fed. Reg. 3911. In the interim, vehicles built between August 1973 and August 1975 were to carry either passive restraints or lap and shoulder belts coupled with an "ignition interlock" that would prevent starting the vehicle if the belts were not connected.[4] On review, the agency's decision to require passive restraints was found to be supported by "substantial evidence" and upheld. *Chrysler Corp.* v. *Department of Transportation*, 472 F. 2d 659 (CA6 1972).[5]

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[4] Early in the process, it was assumed that passive occupant protection meant the installation of inflatable airbag restraint systems. See 34 Fed. Reg. 11148 (1969). In 1971, however, the agency observed that "[s]ome belt-based concepts have been advanced that appear to be capable of meeting the complete passive protection options," leading it to add a new section to the proposed standard "[t]o deal expressly with passive belts." 36 Fed. Reg. 12859.

In preparing for the upcoming model year, most car makers chose the "ignition interlock" option, a decision which was highly unpopular, and led Congress to amend the Act to prohibit a motor vehicle safety standard from requiring or permitting compliance by means of an ignition interlock or a continuous buzzer designed to indicate that safety belts were not in use. Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub. L. 93–492, § 109, 88 Stat. 1482, 15 U. S. C. § 1410b(b). The 1974 Amendments also provided that any safety standard that could be satisfied by a system other than seatbelts would have to be submitted to Congress where it could be vetoed by concurrent resolution of both Houses. 15 U. S. C. § 1410b(b)(2).[6]

The effective date for mandatory passive restraint systems was extended for a year until August 31, 1976. 40 Fed. Reg. 16217 (1975); *id.*, at 33977. But in June 1976, Secretary of Transportation William T. Coleman, Jr., initiated a new rulemaking on the issue, 41 Fed. Reg. 24070. After hearing testimony and reviewing written comments, Coleman extended the optional alternatives indefinitely and suspended the passive restraint requirement. Although he found passive restraints technologically and economically feasible, the Secretary based his decision on the expectation that there would be widespread public resistance to the new systems. He instead proposed a demonstration project involving up to 500,000 cars installed with passive restraints, in order to smooth the way for public acceptance of mandatory passive restraints at a later date. Department of Transportation, The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection (Dec. 6, 1976), App. 2068.

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[5] The court did hold that the testing procedures required of passive belts did not satisfy the Act's requirement that standards be "objective." 472 F. 2d, at 675.

[6] Because such a passive restraint standard was not technically in effect at this time due to the Sixth Circuit's invalidation of the testing requirements, see n. 5, *supra*, the issue was not submitted to Congress until a passive restraint requirement was reimposed by Secretary Adams in 1977. To comply with the Amendments, NHTSA proposed new warning systems to replace the prohibited continuous buzzers. 39 Fed. Reg. 42692 (1974). More significantly, NHTSA was forced to rethink an earlier decision which contemplated use of the interlocks in tandem with detachable belts. See n. 13, *infra*.

Coleman's successor as Secretary of Transportation disagreed. Within months of assuming office, Secretary Brock Adams decided that the demonstration project was unnecessary. He issued a new mandatory passive restraint regulation, known as Modified Standard 208. 42 Fed. Reg. 34289 (1977); 49 CFR § 571.208 (1978). The Modified Standard mandated the phasing in of passive restraints beginning with large cars in model year 1982 and extending to all cars by model year 1984. The two principal systems that would satisfy the Standard were airbags and passive belts; the choice of which system to install was left to the manufacturers. In *Pacific Legal Foundation* v. *Department of Transportation*, 193 U. S. App. D. C. 184, 593 F. 2d 1338, cert. denied, 444 U. S. 830 (1979), the Court of Appeals upheld Modified Standard 208 as a rational, nonarbitrary regulation consistent with the agency's mandate under the Act. The Standard also survived scrutiny by Congress, which did not exercise its authority under the legislative veto provision of the 1974 Amendments.[7]

Over the next several years, the automobile industry geared up to comply with Modified Standard 208. As late as July 1980, NHTSA reported:

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[7] No action was taken by the full House of Representatives. The Senate Committee with jurisdiction over NHTSA affirmatively endorsed the Standard, S. Rep. No. 95–481 (1977), and a resolution of disapproval was tabled by the Senate. 123 Cong. Rec. 33332 (1977).

> "On the road experience in thousands of vehicles equipped with air bags and automatic safety belts has confirmed agency estimates of the life-saving and injury-preventing benefits of such systems. When all cars are equipped with automatic crash protection systems, each year an estimated 9,000 more lives will be saved, and tens of thousands of serious injuries will be prevented." NHTSA, Automobile Occupant Crash Protection, Progress Report No. 3, p. 4; App. in No. 81–2220 (CADC), p. 1627 (hereinafter App.).

In February 1981, however, Secretary of Transportation Andrew Lewis reopened the rulemaking due to changed economic circumstances and, in particular, the difficulties of the automobile industry. 46 Fed. Reg. 12033. Two months later, the agency ordered a one-year delay in the application of the Standard to large cars, extending the deadline to September 1982, *id.*, at 21172, and at the same time, proposed the possible rescission of the entire Standard. *Id.*, at 21205. After receiving written comments and holding public hearings, NHTSA issued a final rule (Notice 25) that rescinded the passive restraint requirement contained in Modified Standard 208.

II

In a statement explaining the rescission, NHTSA maintained that it was no longer able to find, as it had in 1977, that the automatic restraint requirement would produce significant safety benefits. Notice 25, *id.*, at 53419. This judgment reflected not a change of opinion on the effectiveness of the technology, but a change in plans by the automobile industry. In 1977, the agency had assumed that airbags would be installed in 60% of all new cars and automatic seatbelts in 40%. By 1981 it became apparent that automobile manufacturers planned to install the automatic seatbelts in approximately 99% of the new cars. For this reason, the lifesaving potential of airbags would not be realized. Moreover, it now appeared that the overwhelming majority of passive belts planned to be installed by manufacturers could be detached easily and left that way permanently. Passive belts, once detached, then required "the same type of affirmative action that is the stumbling block to obtaining high usage levels of manual belts." *Id.*, at 53421. For this reason, the agency concluded that there was no longer a basis for reliably predicting that the Standard would lead to any significant increased usage of restraints at all.

In view of the possibly minimal safety benefits, the automatic restraint requirement no longer was reasonable or practicable in the agency's view. The requirement would require approximately $1 billion to implement and the agency did not believe it would be reasonable to impose such substantial costs on manufacturers and consumers without more adequate assurance that sufficient safety benefits would accrue. In addition, NHTSA concluded that automatic restraints might have an adverse effect on the public's attitude toward safety. Given the high expense and limited benefits of detachable belts, NHTSA feared that many consumers would regard the Standard as an instance of ineffective regulation, adversely affecting the public's view of safety regulation and, in particular, "poisoning . . . popular sentiment toward efforts to improve occupant restraint systems in the future." *Id.*, at 53424.

State Farm Mutual Automobile Insurance Co. and the National Association of Independent Insurers filed petitions for review of NHTSA's rescission of the passive restraint Standard. The United States Court of Appeals for the District of Columbia Circuit held that the agency's rescission of the passive restraint requirement was arbitrary and capricious. 220 U. S. App. D. C. 170, 680 F. 2d 206 (1982). While observing that rescission is not unrelated to an agency's refusal to take action in the first instance, the court concluded that, in this case, NHTSA's discretion to rescind the passive restraint requirement had been restricted by various forms of congressional "reaction" to the passive restraint issue. It then proceeded to find that the rescission of Standard 208 was arbitrary and capricious for three reasons. First, the court found insufficient as a basis for rescission NHTSA's conclusion that it could not reliably predict an increase in belt usage under the Standard. The court held that there was insufficient evidence in the record to sustain NHTSA's position on this issue, and that, "only a well justified refusal to seek more evidence could render rescission non-arbitrary." *Id.*, at 196, 680 F. 2d, at 232. Second, a majority of the panel[8] concluded that NHTSA inadequately considered the possibility of requiring manufacturers to install nondetachable rather than detachable passive belts. Third, the majority found that the agency acted arbitrarily and capriciously by failing to give any consideration whatever to requiring compliance with Modified Standard 208 by the installation of airbags.

The court allowed NHTSA 30 days in which to submit a schedule for "resolving the questions raised in th[e] opinion." *Id.*, at 206, 680 F. 2d, at 242. Subsequently, the agency filed a Notice of Proposed Supplemental Rulemaking setting forth a schedule for complying with the court's mandate. On August 4, 1982, the Court of Appeals issued an order staying the compliance date for the passive restraint requirement until September 1, 1983, and requested NHTSA to inform the court whether that compliance date was achievable. NHTSA informed the court on October 1, 1982, that based on representations by manufacturers, it did not appear that practicable compliance could be achieved before September 1985. On November 8, 1982, we granted certiorari, 459 U. S. 987, and on November 18, the Court of Appeals entered an order recalling its mandate.

III

Unlike the Court of Appeals, we do not find the appropriate scope of judicial review to be the "most troublesome question" in these cases. Both the Act and the 1974 Amendments concerning occupant crash protection standards indicate that motor vehicle safety standards are to be promulgated under the informal rulemaking procedures of the Administrative Procedure Act. 5 U. S. C. § 553. The agency's action in promulgating such standards therefore may be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. § 706(2)(A); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 414 (1971); *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U. S. 281 (1974). We believe that the rescission or modification of an occupant-protection standard is subject to the same test. Section 103(b) of the Act, 15 U. S. C. § 1392(b), states that the procedural and judicial review provisions of the Administrative Procedure Act "shall apply to all orders establishing, amending, or revoking a Federal motor vehicle safety standard," and suggests no difference in the scope of judicial review depending upon the nature of the agency's action.

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[8] Judge Edwards did not join the majority's reasoning on these points.

Petitioner Motor Vehicle Manufacturers Association (MVMA) disagrees, contending that the rescission of an agency rule should be judged by the same standard a court would use to judge an agency's refusal to promulgate a rule in the first place—a standard petitioner believes considerably narrower than the traditional arbitrary-and-capricious test. We reject this view. The Act expressly equates orders "revoking" and "establishing" safety standards; neither that Act nor the APA suggests that revocations are to be treated as refusals to promulgate standards. Petitioner's view would render meaningless Congress' authorization for judicial review of orders revoking safety rules. Moreover, the revocation of an extant regulation is substantially different than a failure to act. Revocation constitutes a reversal of the agency's former views as to the proper course. A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." *Atchison, T. & S. F. R. Co.* v. *Wichita Bd. of Trade*, 412 U. S. 800, 807–808 (1973). Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

In so holding, we fully recognize that "[r]egulatory agencies do not establish rules of conduct to last forever," *American Trucking Assns., Inc.* v. *Atchison, T. & S. F. R. Co.*, 387 U. S. 397, 416 (1967), and that an agency must be given ample latitude to "adapt their rules and policies to the demands of changing circumstances." *Permian Basin Area Rate Cases*, 390 U. S. 747, 784 (1968). But the forces of change do not always or necessarily point in the direction of deregulation. In the abstract, there is no more reason to presume that changing circumstances require the rescission of prior action, instead of a revision in or even the extension of current regulation. If Congress established a presumption from which judicial review should start, that presumption—contrary to petitioners' views—is not *against* safety regulation, but *against* changes in current policy that are not justified by the rulemaking record. While the removal of a regulation may not entail the monetary expenditures and other costs of enacting a new standard, and, accordingly, it may be easier for an agency to justify a deregulatory action, the direction in which an agency chooses to move does not alter the standard of judicial review established by law.

The Department of Transportation accepts the applicability of the "arbitrary and capricious" standard. It argues that under this standard, a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute. We do not disagree with this formulation.[9] The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 168 (1962). In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., supra*, at 285; *Citizens to Preserve Overton Park* v. *Volpe, supra*, at 416. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given. *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947). We will, however, "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc., supra*, at 286. See also *Camp* v. *Pitts*, 411 U. S. 138, 142–143 (1973) *(per curiam)*. For purposes of these cases, it is also relevant that Congress required a record of the rulemaking proceedings to be compiled and submitted to a reviewing court, 15 U. S. C. § 1394, and intended that agency findings under the Act would be supported by "substantial evidence on the record considered as a whole." S. Rep. No. 1301, 89th Cong., 2d Sess., 8 (1966); H. R. Rep. No. 1776, 89th Cong., 2d Sess., 21 (1966).

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[9] The Department of Transportation suggests that the arbitrary-and-capricious standard requires no more than the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause. We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate.

IV

The Court of Appeals correctly found that the arbitrary-and-capricious test applied to rescissions of prior agency regulations, but then erred in intensifying the scope of its review based upon its reading of legislative events. It held that congressional reaction to various versions of Standard 208 "raise[d] doubts" that NHTSA's rescission "necessarily demonstrates an effort to fulfill its statutory mandate," and therefore the agency was obligated to provide "increasingly clear and convincing reasons" for its action. 220 U. S. App. D. C., at 186, 193, 680 F. 2d, at 222, 229. Specifically, the Court of Appeals found significance in three legislative occurrences:

> "In 1974, Congress banned the ignition interlock but did not foreclose NHTSA's pursuit of a passive restraint standard. In 1977, Congress allowed the standard to take effect when neither of the concurrent resolutions needed for disapproval was passed. In 1980, a majority of each house indicated support for the concept of mandatory passive restraints and a majority of each house supported the unprecedented attempt to require some installation of airbags." *Id.*, at 192, 680 F. 2d, at 228.

From these legislative acts and nonacts the Court of Appeals derived a "congressional commitment to the concept of automatic crash protection devices for vehicle occupants." *Ibid.*

This path of analysis was misguided and the inferences it produced are questionable. It is noteworthy that in this Court respondent State Farm expressly agrees that the postenactment legislative history of the Act does not heighten the standard of review of NHTSA's actions. Brief for Respondent State Farm Mutual Automobile Insurance Co. 13. State Farm's concession is well taken for this Court has never suggested that the *standard* of review is enlarged or diminished by subsequent congressional action. While an agency's interpretation of a statute may be confirmed or ratified by subsequent congressional failure to change that interpretation, *Bob Jones University* v. *United States*, 461 U. S. 574, 599–602 (1983); *Haig* v. *Agee*, 453 U. S. 280, 291–300 (1981), in the cases before us, even an unequivocal ratification—short of statutory incorporation—of the passive restraint standard would not connote approval or disapproval of an agency's later decision to rescind the regulation. That decision remains subject to the arbitrary-and-capricious standard.

That we should not be so quick to infer a congressional mandate for passive restraints is confirmed by examining the postenactment legislative events cited by the Court of Appeals. Even were we inclined to rely on inchoate legislative action, the inferences to be drawn fail to suggest that NHTSA acted improperly in rescinding Standard 208. First, in 1974 a mandatory passive restraint standard was technically not in effect, see n. 6, *supra;* Congress had no reason to foreclose that course. Moreover, one can hardly infer support for a mandatory standard from Congress' decision to provide that such a regulation would be subject to disapproval by resolutions of disapproval in both Houses. Similarly, no mandate can be divined from the tabling of resolutions of disapproval which were introduced in 1977. The failure of Congress to exercise its veto might reflect legislative deference to the agency's expertise and does not indicate that Congress would disapprove of the agency's action in 1981. And even if Congress favored the Standard in 1977, it—like NHTSA—may well reach a different judgment, given changed circumstances four years later. Finally, the Court of Appeals read too much into floor action on the 1980 authorization bill, a bill which was not enacted into law. Other contemporaneous events could be read as showing equal congressional hostility to passive restraints.[10]

V

The ultimate question before us is whether NHTSA's rescission of the passive restraint requirement of Standard 208 was arbitrary and capricious. We conclude, as did the Court of Appeals, that it was. We also conclude, but for somewhat different reasons, that further consideration of the issue by the agency is therefore required. We deal separately with the rescission as it applies to airbags and as it applies to seatbelts.

A

The first and most obvious reason for finding the rescission arbitrary and capricious is that NHTSA apparently gave no consideration whatever to modifying the Standard to require that airbag technology be utilized. Standard 208 sought to achieve automatic crash protection by requiring automobile manufacturers to install either of two passive restraint devices: airbags or automatic seatbelts. There was no suggestion in the long rulemaking process that led to Standard 208 that if only one of these options were feasible, no passive restraint standard should be promulgated. Indeed, the agency's original proposed Standard contemplated the installation of inflatable restraints in all cars.[11] Automatic belts were added as a means of complying with the Standard because they were believed to be as effective as airbags in achieving the goal of occupant crash protection. 36 Fed. Reg. 12859 (1971). At that time, the passive belt approved by the agency could not be detached.[12] Only later, at a manufacturer's behest, did the agency approve of the detachability feature—and only after assurances that the feature would not compromise the safety benefits of the restraint.[13] Although it was then foreseen that 60% of the new cars would contain airbags and 40% would have automatic seatbelts, the ratio between the two was not significant as long as the passive belt would also assure greater passenger safety.

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[10] For example, an overwhelming majority of the Members of the House of Representatives voted in favor of a proposal to bar NHTSA from spending funds to administer an occupant restraint standard unless the standard permitted the purchaser of the vehicle to select manual rather than passive restraints. 125 Cong. Rec. 36926 (1979).

[11] While NHTSA's 1970 passive restraint requirement permitted compliance by means other than the airbag, 35 Fed. Reg. 16927, "[t]his rule was a de facto air bag mandate since no other technologies were available to comply with the standard." Graham & Gorham, NHTSA and Passive Restraints: A Case of Arbitrary and Capricious Deregulation, 35 Ad. L. Rev. 193, 197 (1983). See n. 4, *supra*.

The agency has now determined that the detachable automatic belts will not attain anticipated safety benefits because so many individuals will detach the mechanism. Even if this conclusion were acceptable in its entirety, see *infra*, at 51–54, standing alone it would not justify any more than an amendment of Standard 208 to disallow compliance by means of the one technology which will not provide effective passenger protection. It does not cast doubt on the need for a passive restraint standard or upon the efficacy of airbag technology. In its most recent rulemaking, the agency again acknowledged the lifesaving potential of the airbag:

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[12] Although the agency suggested that passive restraint systems contain an emergency release mechanism to allow easy extrication of passengers in the event of an accident, the agency cautioned that "[i]n the case of passive safety belts, it would be required that the release not cause belt separation, and that the system be self-restoring after operation of the release." 36 Fed. Reg. 12866 (1971).

[13] In April 1974, NHTSA adopted the suggestion of an automobile manufacturer that emergency release of passive belts be accomplished by a conventional latch—provided the restraint system was guarded by an ignition interlock and warning buzzer to encourage reattachment of the passive belt. 39 Fed. Reg. 14593. When the 1974 Amendments prohibited these devices, the agency simply eliminated the interlock and buzzer requirements, but continued to allow compliance by a detachable passive belt.

> "The agency has no basis at this time for changing its earlier conclusions in 1976 and 1977 that basic air bag technology is sound and has been sufficiently demonstrated to be effective in those vehicles in current use . . . ." NHTSA Final Regulatory Impact Analysis (RIA) XI-4 (Oct. 1981), App. 264.

Given the effectiveness ascribed to airbag technology by the agency, the mandate of the Act to achieve traffic safety would suggest that the logical response to the faults of detachable seatbelts would be to require the installation of airbags. At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment. But the agency not only did not require compliance through airbags, it also did not even consider the possibility in its 1981 rulemaking. Not one sentence of its rulemaking statement discusses the airbags-only option. Because, as the Court of Appeals stated, "NHTSA's . . . analysis of airbags was nonexistent," 220 U. S. App. D. C., at 200, 680 F. 2d, at 236, what we said in *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S., at 167, is apropos here:

> "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such . . . practice. . . . Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.' *New York* v. *United States*, 342 U. S. 882, 884 (dissenting opinion)" (footnote omitted).

We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner, *Atchison, T. & S. F. R. Co.* v. *Wichita Bd. of Trade*, 412 U. S., at 806; *FTC* v. *Sperry & Hutchinson Co.*, 405 U. S. 233, 249 (1972); *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U. S. 438, 443 (1965); and we reaffirm this principle again today.

The automobile industry has opted for the passive belt over the airbag, but surely it is not enough that the regulated industry has eschewed a given safety device. For nearly a decade, the automobile industry waged the regulatory equivalent of war against the airbag[14] and lost—the inflatable restraint was proved sufficiently effective. Now the automobile industry has decided to employ a seatbelt system which will not meet the safety objectives of Standard 208. This hardly constitutes cause to revoke the Standard itself. Indeed, the Act was necessary because the industry was not sufficiently responsive to safety concerns. The Act intended that safety standards not depend on current technology and could be "technology-forcing" in the sense of inducing the development of superior safety design. See *Chrysler Corp.* v. *Department of Transportation*, 472 F. 2d, at 672–673. If, under the statute, the agency should not defer to the industry's failure to develop safer cars, which it surely should not do, *a fortiori* it may not revoke a safety standard which can be satisfied by current technology simply because the industry has opted for an ineffective seatbelt design.

Although the agency did not address the mandatory airbag option and the Court of Appeals noted that "airbags seem to have none of the problems that NHTSA identified in passive seatbelts," 220 U. S. App. D. C., at 201, 680 F. 2d, at 237, petitioners recite a number of difficulties that they believe would be posed by a mandatory airbag standard. These range from questions concerning the installation of airbags in small cars to that of adverse public reaction. But these are not the agency's reasons for rejecting a mandatory airbag standard. Not having discussed the possibility, the agency submitted no reasons at all. The short—and sufficient—answer to petitioners' submission is that the courts may not accept appellate counsel's *post hoc* rationalizations for agency action. *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S., at 168. It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself. *Ibid.; SEC* v. *Chenery Corp.*, 332 U. S., at 196; *American Textile Mfrs. Institute, Inc.* v. *Donovan*, 452 U. S. 490, 539 (1981).[15]

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[14] See, *e. g.*, Comments of Chrysler Corp., Docket No. 69–07, Notice 11 (Aug. 5, 1971) (App. 2491); Chrysler Corp. Memorandum on Proposed Alternative Changes to FMVSS 208, Docket No. 44, Notice 76–8 (1976) (App. 2241); General Motors Corp. Response to the Dept. of Transportation Proposal on Occupant Crash Protection, Docket No. 74–14, Notice 08 (May 27, 1977) (App. 1745). See also *Chrysler Corp.* v. *Department of Transportation*, 472 F. 2d 659 (CA6 1972).

Petitioners also invoke our decision in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519 (1978), as though it were a talisman under which any agency decision is by definition unimpeachable. Specifically, it is submitted that to require an agency to consider an airbags-only alternative is, in essence, to dictate to the agency the procedures it is to follow. Petitioners both misread *Vermont Yankee* and misconstrue the nature of the remand that is in order. In *Vermont Yankee*, we held that a court may not impose additional procedural requirements upon an agency. We do not require today any specific proce-

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[15] The Department of Transportation expresses concern that adoption of an airbags-only requirement would have required a new notice of proposed rulemaking. Even if this were so, and we need not decide the question, it would not constitute sufficient cause to rescind the passive restraint requirement. The Department also asserts that it was reasonable to withdraw the requirement as written to avoid forcing manufacturers to spend resources to comply with an ineffective safety initiative. We think that it would have been permissible for the agency to temporarily suspend the passive restraint requirement or to delay its implementation date while an airbag mandate was studied. But, as we explain in text, that option had to be considered before the passive restraint requirement could be revoked.

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dures which NHTSA must follow. Nor do we broadly require an agency to consider all policy alternatives in reaching decision. It is true that rulemaking "cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man . . . regardless of how uncommon or unknown that alternative may have been . . . ." *Id.*, at 551. But the airbag is more than a policy alternative to the passive restraint Standard; it is a technological alternative within the ambit of the existing Standard. We hold only that given the judgment made in 1977 that airbags are an effective and cost-beneficial lifesaving technology, the mandatory passive restraint rule may not be abandoned without any consideration whatsoever of an airbags-only requirement.

B

Although the issue is closer, we also find that the agency was too quick to dismiss the safety benefits of automatic seatbelts. NHTSA's critical finding was that, in light of the industry's plans to install readily detachable passive belts, it could not reliably predict "even a 5 percentage point increase as the minimum level of expected usage increase." 46 Fed. Reg. 53423 (1981). The Court of Appeals rejected this finding because there is "not one iota" of evidence that Modified Standard 208 will fail to increase nationwide seatbelt use by at least 13 percentage points, the level of increased usage necessary for the Standard to justify its cost. Given the lack of probative evidence, the court held that "only a well justified refusal to seek more evidence could render rescission non-arbitrary." 220 U. S. App. D. C., at 196, 680 F. 2d, at 232.

Petitioners object to this conclusion. In their view, "substantial uncertainty" that a regulation will accomplish its intended purpose is sufficient reason, without more, to rescind a regulation. We agree with petitioners that just as an agency reasonably may decline to issue a safety standard if it is uncertain about its efficacy, an agency may also revoke a standard on the basis of serious uncertainties if supported by the record and reasonably explained. Rescission of the passive restraint requirement would not be arbitrary and capricious simply because there was no evidence in direct support of the agency's conclusion. It is not infrequent that the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion. Recognizing that policymaking in a complex society must account for uncertainty, however, does not imply that it is sufficient for an agency to merely recite the terms "substantial uncertainty" as a justification for its actions. As previously noted, the agency must explain the evidence which is available, and must offer a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc.* v. *United States*, *supra*, at 168. Generally, one aspect of that explanation would be a justification for rescinding the regulation before engaging in a search for further evidence.

In these cases, the agency's explanation for rescission of the passive restraint requirement is *not* sufficient to enable us to conclude that the rescission was the product of reasoned decisionmaking. To reach this conclusion, we do not upset the agency's view of the facts, but we do appreciate the limitations of this record in supporting the agency's decision. We start with the accepted ground that if used, seatbelts unquestionably would save many thousands of lives and would prevent tens of thousands of crippling injuries. Unlike recent regulatory decisions we have reviewed, *Industrial Union Dept.* v. *American Petroleum Institute*, 448 U. S. 607 (1980); *American Textile Mfrs. Institute, Inc.* v. *Donovan*, 452 U. S. 490 (1981), the safety benefits of wearing seatbelts are not in doubt, and it is not challenged that were those benefits to accrue, the monetary costs of implementing the Standard would be easily justified. We move next to the fact that there is no direct evidence in support of the agency's finding that detachable automatic belts cannot be predicted to yield a substantial increase in usage. The empirical evidence on the record, consisting of surveys of drivers of automobiles equipped with passive belts, reveals more than a doubling of the usage rate experienced with manual belts.[16] Much of the agency's rulemaking statement—and much of the controversy in these cases—centers on the conclusions that should be drawn from these studies. The agency maintained that the doubling of seatbelt usage in these studies could not be extrapolated to an across-the-board mandatory standard because the passive seatbelts were guarded by ignition interlocks and purchasers of the tested cars are somewhat atypical.[17] Respondents insist these studies demonstrate that Modified Standard 208 will substantially increase seatbelt usage. We believe that it is within the agency's discretion to pass upon the generalizability of these field studies. This is precisely the type of issue which rests within the expertise of NHTSA, and upon which a reviewing court must be most hesitant to intrude.

But accepting the agency's view of the field tests on passive restraints indicates only that there is no reliable real-world experience that usage rates will substantially increase. To be sure, NHTSA opines that "it cannot reliably predict even a 5 percentage point increase as the minimum level of expected increased usage." Notice 25, 46 Fed. Reg. 53423 (1981). But this and other statements that passive belts will not yield substantial increases in seatbelt usage apparently take no account of the critical difference between detachable automatic belts and current manual belts. A detached passive belt does require an affirmative act to reconnect it, but—unlike a manual seatbelt—the passive belt, once reattached, will continue to function automatically unless again disconnected. Thus, inertia—a factor which the agency's own studies have found significant in explaining the current low usage rates for seatbelts[18]—works in *favor* of, not *against*, use of the protective device. Since 20% to 50% of motorists currently wear seatbelts on some occasions,[19] there would seem to be grounds to believe that seatbelt use by occasional users will be substantially increased by the detachable passive belts. Whether this is in fact the case is a matter for the agency to decide, but it must bring its expertise to bear on the question.

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[16] Between 1975 and 1980, Volkswagen sold approximately 350,000 Rabbits equipped with detachable passive seatbelts that were guarded by an ignition interlock. General Motors sold 8,000 1978 and 1979 Chevettes with a similar system, but eliminated the ignition interlock on the 13,000 Chevettes sold in 1980. NHTSA found that belt usage in the Rabbits averaged 34% for manual belts and 84% for passive belts. RIA, at IV–52, App. 108. For the 1978–1979 Chevettes, NHTSA calculated 34% usage for manual belts and 72% for passive belts. On 1980 Chevettes, the agency found these figures to be 31% for manual belts and 70% for passive belts. *Ibid.*

[17] "NHTSA believes that the usage of automatic belts in Rabbits and Chevettes would have been substantially lower if the automatic belts in those cars were not equipped with a use-inducing device inhibiting detachment." Notice 25, 46 Fed. Reg. 53422 (1981).

The agency is correct to look at the costs as well as the benefits of Standard 208. The agency's conclusion that the incremental costs of the requirements were no longer reasonable was predicated on its prediction that the safety benefits of the regulation might be minimal. Specifically, the agency's fears that the public may resent paying more for the automatic belt systems is expressly dependent on the assumption that detachable automatic belts will not produce more than "negligible safety benefits." *Id.*, at 53424. When the agency reexamines its findings as to the likely increase in seatbelt usage, it must also reconsider its judgment of the reasonableness of the monetary and other costs associated with the Standard. In reaching its judgment, NHTSA should bear in mind that Congress intended safety to be the pre-eminent factor under the Act:

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[18] NHTSA commissioned a number of surveys of public attitudes in an effort to better understand why people were not using manual belts and to determine how they would react to passive restraints. The surveys reveal that while 20% to 40% of the public is opposed to wearing manual belts, the larger proportion of the population does not wear belts because they forgot or found manual belts inconvenient or bothersome. RIA, at IV–25, App. 81. In another survey, 38% of the surveyed group responded that they would welcome automatic belts, and 25% would "tolerate" them. See RIA, at IV–37, App. 93. NHTSA did not comment upon these attitude surveys in its explanation accompanying the rescission of the passive restraint requirement.

[19] Four surveys of manual belt usage were conducted for NHTSA between 1978 and 1980, leading the agency to report that 40% to 50% of the people use their belts at least some of the time. RIA, at IV–25, App. 81.

> "The Committee intends that safety shall be the overriding consideration in the issuance of standards under this bill. The Committee recognizes . . . that the Secretary will necessarily consider reasonableness of cost, feasibility and adequate leadtime." S. Rep. No. 1301, 89th Cong., 2d Sess., 6 (1966).
>
> "In establishing standards the Secretary must conform to the requirement that the standard be practicable. This would require consideration of all relevant factors, including technological ability to achieve the goal of a particular standard as well as consideration of economic factors.
>
> "Motor vehicle safety is the paramount purpose of this bill and each standard must be related thereto." H. R. Rep. No. 1776, 89th Cong., 2d Sess., 16 (1966).

The agency also failed to articulate a basis for not requiring nondetachable belts under Standard 208. It is argued that the concern of the agency with the easy detachability of the currently favored design would be readily solved by a continuous passive belt, which allows the occupant to "spool out" the belt and create the necessary slack for easy extrication from the vehicle. The agency did not separately consider the continuous belt option, but treated it together with the ignition interlock device in a category it titled "Option of Adopting Use-Compelling Features." 46 Fed. Reg. 53424

(1981). The agency was concerned that use-compelling devices would "complicate the extrication of [an] occupant from his or her car." *Ibid.* "[T]o require that passive belts contain use-compelling features," the agency observed, "could be counterproductive [, given] . . . widespread, latent and irrational fear in many members of the public that they could be trapped by the seat belt after a crash." *Ibid.* In addition, based on the experience with the ignition interlock, the agency feared that use-compelling features might trigger adverse public reaction.

By failing to analyze the continuous seatbelts option in its own right, the agency has failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary-and-capricious standard. We agree with the Court of Appeals that NHTSA did not suggest that the emergency release mechanisms used in nondetachable belts are any less effective for emergency egress than the buckle release system used in detachable belts. In 1978, when General Motors obtained the agency's approval to install a continuous passive belt, it assured the agency that nondetachable belts with spool releases were as safe as detachable belts with buckle releases. 43 Fed. Reg. 21912, 21913–21914 (1978). NHTSA was satisfied that this belt design assured easy extricability: "[t]he agency does not believe that the use of [such] release mechanisms will cause serious occupant egress problems . . . ." *Id.*, at 52493, 52494. While the agency is entitled to change its view on the acceptability of continuous passive belts, it is obligated to explain its reasons for doing so.

The agency also failed to offer any explanation why a continuous passive belt would engender the same adverse public reaction as the ignition interlock, and, as the Court of Appeals concluded, "every indication in the record points the other way." 220 U. S. App. D. C., at 198, 680 F. 2d, at 234.[20]

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[20] The Court of Appeals noted previous agency statements distinguishing interlocks from passive restraints. 42 Fed. Reg. 34290 (1977); 36 Fed. Reg. 8296 (1971); RIA, at II–4, App. 30.

We see no basis for equating the two devices: the continous belt, unlike the ignition interlock, does not interfere with the operation of the vehicle. More importantly, it is the agency's responsibility, not this Court's, to explain its decision.

VI

"An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis . . . ." *Greater Boston Television Corp.* v. *FCC*, 143 U. S. App. D. C. 383, 394, 444 F. 2d 841, 852 (1970) (footnote omitted), cert. denied, 403 U. S. 923 (1971). We do not accept all of the reasoning of the Court of Appeals but we do conclude that the agency has failed to supply the requisite "reasoned analysis" in this case. Accordingly, we vacate the judgment of the Court of Appeals and remand the cases to that court with directions to remand the matter to the NHTSA for further consideration consistent with this opinion.[21]

So ordered.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE O'CONNOR join, concurring in part and dissenting in part.

I join Parts I, II, III, IV, and V–A of the Court's opinion. In particular, I agree that, since the airbag and continuous spool automatic seatbelt were explicitly approved in the Standard the agency was rescinding, the agency should explain why it declined to leave those requirements intact. In this case, the agency gave no explanation at all. Of course, if the agency can provide a rational explanation, it may adhere to its decision to rescind the entire Standard.

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[21] Petitioners construe the Court of Appeals' order of August 4, 1982, as setting an implementation date for Standard 208, in violation of *Vermont Yankee*'s injunction against imposing such time constraints. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 544–545 (1978). Respondents maintain that the Court of Appeals simply stayed the effective date of Standard 208, which, not having been validly rescinded, would have required mandatory passive restraints for new cars after September 1, 1982. We need not choose between these views because the agency had sufficient justification to suspend, although not to rescind, Standard 208, pending the further consideration required by the Court of Appeals, and now, by us.

I do not believe, however, that NHTSA's view of detachable automatic seatbelts was arbitrary and capricious. The agency adequately explained its decision to rescind the Standard insofar as it was satisfied by detachable belts.

The statute that requires the Secretary of Transportation to issue motor vehicle safety standards also requires that "[e]ach such . . . standard shall be practicable [and] shall meet the need for motor vehicle safety." 15 U. S. C. § 1392(a) (1976 ed., Supp. V). The Court rejects the agency's explanation for its conclusion that there is substantial uncertainty whether requiring installation of detachable automatic belts would substantially increase seatbelt usage. The agency chose not to rely on a study showing a substantial increase in seatbelt usage in cars equipped with automatic seatbelts *and* an ignition interlock to prevent the car from being operated when the belts were not in place *and* which were voluntarily purchased with this equipment by consumers. See *ante*, at 53, n. 16. It is reasonable for the agency to decide that this study does not support any conclusion concerning the effect of automatic seatbelts that are installed in all cars whether the consumer wants them or not and are not linked to an ignition interlock system.

The Court rejects this explanation because "there would seem to be grounds to believe that seatbelt use by occasional users will be substantially increased by the detachable passive belts," *ante*, at 54, and the agency did not adequately explain its rejection of these grounds. It seems to me that the agency's explanation, while by no means a model, is adequate. The agency acknowledged that there would probably be some increase in belt usage, but concluded that the increase would be small and not worth the cost of mandatory detachable automatic belts. 46 Fed. Reg. 53421–53423 (1981). The agency's obligation is to articulate a "'rational connection between the facts found and the choice made.'" *Ante*, at 42, 52, quoting *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 168 (1962). I believe it has met this standard.

The agency explicitly stated that it will increase its educational efforts in an attempt to promote public understanding, acceptance, and use of passenger restraint systems. 46 Fed. Reg. 53425 (1981). It also stated that it will "initiate efforts with automobile manufacturers to ensure that the public will have [automatic crash protection] technology available. If this does not succeed, the agency will consider regulatory action to assure that the last decade's enormous advances in crash protection technology will not be lost." *Id.*, at 53426.

The agency's changed view of the standard seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress,* it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.

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*Of course, a new administration may not refuse to enforce laws of which it does not approve, or to ignore statutory standards in carrying out its regulatory functions. But in this case, as the Court correctly concludes, *ante*, at 44–46, Congress has not required the agency to require passive restraints.

BOLGER ET AL. *v.* YOUNGS DRUG PRODUCTS CORP.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 81-1590. Argued January 12, 1983—Decided June 24, 1983

Title 39 U. S. C. § 3001(e)(2) prohibits the mailing of unsolicited advertisements for contraceptives. When appellee manufacturer of contraceptives proposed to mail to the public unsolicited advertisements including informational pamphlets promoting its products but also discussing venereal disease and family planning, the Postal Service notified appellee that the proposed mailings would violate § 3001(e)(2). Appellee then brought an action for declaratory and injunctive relief in Federal District Court, which held that the statute, as applied to the proposed mailings, violated the First Amendment.

Held: As applied to appellee's proposed mailings, § 3001(e)(2) is unconstitutional. Pp. 64–75.

(a) The mailings, which are concededly advertisements, refer to specific products, and are economically motivated, constitute commercial speech notwithstanding the fact that they contain discussions of important public issues such as the prevention of venereal disease and family planning. Pp. 64–68.

(b) Advertising for contraceptives not only implicates "substantial individual and societal interests" in the free flow of commercial information, but also relates to activity that is protected from unwarranted governmental interference. Thus, appellee's proposed commercial speech is clearly protected by the First Amendment. P. 69.

(c) Neither of the interests asserted by appellants—that § 3001(e)(2) shields recipients of mail from materials that they are likely to find offensive and aids parents' efforts to control the manner in which their children become informed about birth control—is sufficient to justify the sweeping prohibition on the mailing of unsolicited contraceptive advertisements. The fact that protected speech may be offensive to some persons does not justify its suppression, and, in any event, recipients of objectionable mailings can avoid further offensiveness simply by averting their eyes or disposing of the mailings in a trash can. While the second asserted interest is substantial, § 3001(e)(2) as a means of effectuating this interest fails to withstand scrutiny. The statute's marginal degree of protection afforded those parents who desire to keep their children from confronting such mailings is improperly achieved by purging all mailboxes of unsolicited material that is entirely suitable for adults. Section 3001(e)(2) is also defective because it denies parents truthful information bearing on their ability to discuss birth control and to make informed decisions in this area. Pp. 70–75.

526 F. Supp. 823, affirmed.

Marshall, J., delivered the opinion of the Court, in which Burger, C. J., and White, Blackmun, and Powell, JJ., joined. Rehnquist, J., filed an opinion concurring in the judgment, in which O'Connor, J., joined, *post*, p. 75. Stevens, J., filed an opinion concurring in the judgment, *post*, p. 80. Brennan, J., took no part in the decision of the case.

David A. Strauss argued the cause for appellants. With him on the briefs were *Solicitor General Lee* and *Deputy Solicitor General Geller*.

Jerold S. Solovy argued the cause for appellee. With him on the brief were *Robert L. Graham* and *Laura A. Kaster*.*

Justice Marshall delivered the opinion of the Court.

Title 39 U. S. C. § 3001(e)(2) prohibits the mailing of unsolicited advertisements for contraceptives. The District Court held that, as applied to appellee's mailings, the statute violates the First Amendment. We affirm.

I

Section 3001(e)(2) states that "[a]ny unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs . . . ."[1] As interpreted by Postal

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**Robert D. Joffe, Eve W. Paul,* and *Dara Klassel* filed a brief for the Planned Parenthood Federation of America, Inc., et al. as *amici curiae* urging affirmance.

Michael L. Burack, Charles S. Sims, and *Janet Benshoof* filed a brief for the American Civil Liberties Union as *amicus curiae*.

[1] Section 3001(e)(2) contains express limitations. In particular, an advertisement is not deemed unsolicited "if it is contained in a publication for which the addressee has paid or promised to pay a consideration or which he has otherwise indicated he desires to receive." In addition, the provision does not apply to advertisements mailed to certain recipients such as a manufacturer of contraceptives, a licensed physician, or a pharmacist. See §§ 3001(e)(2)(A) and (B).

Service regulations,[2] the statutory provision does not apply to unsolicited advertisements in which the mailer has no commercial interest. In addition to the civil consequences of a violation of § 3001(e)(2), 18 U. S. C. § 1461 makes it a crime knowingly to use the mails for anything declared by § 3001(e) to be nonmailable.[3]

Appellee Youngs Drug Products Corp. (Youngs) is engaged in the manufacture, sale, and distribution of contraceptives. Youngs markets its products primarily through sales to chain warehouses and wholesale distributors, who in turn sell contraceptives to retail pharmacists, who then sell those products to individual customers. Appellee publicizes the availability and desirability of its products by various methods. This litigation resulted from Youngs' decision to undertake a campaign of unsolicited mass mailings to members of the public. In conjunction with its wholesalers and retailers, Youngs seeks to mail to the public on an unsolicited basis three types of materials:

—multi-page, multi-item flyers promoting a large variety of products available at a drugstore, including prophylactics;

—flyers exclusively or substantially devoted to promoting prophylactics;

—informational pamphlets discussing the desirability and availability of prophylactics in general or Youngs' products in particular.[4]

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[2] Domestic Mail Manual § 123.434 (July 7, 1981). The Manual, which is issued pursuant to the Postal Service's power to adopt regulations, 39 U. S. C. § 401, is incorporated by reference into 39 CFR pt. 111 (1982).

The Postal Service's interpretation of § 3001(e)(2) resulted from the decision in *Associated Students for Univ. of Cal. at Riverside* v. *Attorney General*, 368 F. Supp. 11 (CD Cal. 1973), in which a three-judge court held that the prohibition on the mailing of "advertisements" could not constitutionally be expanded beyond the commercial sense of the term, *id.*, at 24.

[3] The offense is punishable by a fine of not more than $5,000 or imprisonment for not more than 5 years, or both, for the first offense; and a fine of not more than $10,000 or imprisonment for not more than 10 years, or both, for each subsequent offense. 18 U. S. C. § 1461.

[4] In the District Court, Youngs offered two examples of informational pamphlets. See Record, Complaint, Group Exhibit C. The first, entitled

In 1979 the Postal Service traced to a wholesaler of Youngs' products an allegation of an unsolicited mailing of contraceptive advertisements. The Service warned the wholesaler that the mailing violated 39 U. S. C. § 3001(e)(2). Subsequently, Youngs contacted the Service and furnished it with copies of Youngs' three types of proposed mailings, stating its view that the statute could not constitutionally restrict the mailings. The Service rejected Youngs' legal argument and notified the company that the proposed mailings would violate § 3001(e)(2). Youngs then brought this action for declaratory and injunctive relief in the United States District Court for the District of Columbia. It claimed that the statute, as applied to its proposed mailings, violated the First Amendment and that Youngs and its wholesaler were refraining from distributing the advertisements because of the Service's warning.

The District Court determined that § 3001(e)(2), by its plain language, prohibited all three types of proposed mailings. The court then addressed the constitutionality of the statute as applied to these mailings. Finding all three types of materials to be commercial solicitations, the court considered the constitutionality of the statute within the framework established by this Court for analyzing restrictions imposed on commercial speech. The court concluded that the statutory prohibition was more extensive than necessary to the interests asserted by the Government, and

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"Condoms and Human Sexuality," is a 12-page pamphlet describing the use, manufacture, desirability, and availability of condoms, and providing detailed descriptions of various Trojan-brand condoms manufactured by Youngs. The second, entitled "Plain Talk about Venereal Disease," is an eight-page pamphlet discussing at length the problem of venereal disease and the use and advantages of condoms in aiding the prevention of venereal disease. The only identification of Youngs or its products is at the bottom of the last page of the pamphlet, which states that the pamphlet has been contributed as a public service by Youngs, the distributor of Trojan-brand prophylactics.

it therefore held that the statute's absolute ban on the three types of mailings violated the First Amendment.[5] 526 F. Supp. 823 (1981).

Appellants brought this direct appeal pursuant to 28 U. S. C. § 1252, see *United States* v. *Darusmont*, 449 U. S. 292, 293 (1981), and we noted probable jurisdiction, 456 U. S. 970 (1982).

II

Beginning with *Bigelow* v. *Virginia*, 421 U. S. 809 (1975), this Court extended the protection of the First Amendment to commercial speech.[6] Nonetheless, our decisions have recognized "the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 455–456 (1978). Thus, we have held that the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 562–563 (1980); *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771–772, n. 24 (1976).

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[5] The District Court ordered that the multi-item drugstore flyers containing promotion of contraceptives could be mailed to the same extent such flyers could be mailed if they did not contain such promotion. With respect to flyers and pamphlets devoted to promoting the desirability or availability of contraceptives, the court's order states that such materials were mailable only under four conditions:

"First, they must be mailed in an envelope that completely obscures from the sight of the addressee the contents. Second, the envelope must contain a prominent notice stating in capital letters that the enclosed material has not been solicited in any way by the recipient. Third, the envelope must contain a prominent warning that the contents are 'promotional material for contraceptive products.' Fourth, the envelope must contain a notice, in less prominent lettering than the warning and the other notice, but not in 'fine print,' that federal law permits the recipient to have his name removed from the mailing list of the mailer of that envelope, and citing to 39 U. S. C. § 3008(a)." 526 F. Supp. 823, 830 (1981).

Youngs did not file a cross-appeal challenging these restrictions, and their propriety is therefore not before us in this case.

[6] Before that time, purely commercial advertising received no First Amendment protection. See *Valentine* v. *Chrestensen*, 316 U. S. 52, 54 (1942).

For example, as a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972). With respect to noncommercial speech, this Court has sustained content-based restrictions only in the most extraordinary circumstances.[7] See *Consolidated Edison Co.* v. *Public Service Comm'n of New York*, 447 U. S. 530, 538–539 (1980); Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U. Chi. L. Rev. 81, 82 (1978). By contrast, regulation of commercial speech based on content is less problematic. In light of the greater potential for deception or confusion in the context of certain advertising messages, see *In re R. M. J.*, 455 U. S. 191, 200 (1982), content-based restrictions on commercial speech may be permissible. See *Friedman* v. *Rogers*, 440 U. S. 1 (1979) (upholding prohibition on use of trade names by optometrists).

Because the degree of protection afforded by the First Amendment depends on whether the activity sought to be regulated constitutes commercial or noncommercial speech, we must first determine the proper classification of the mailings at issue here. Appellee contends that its proposed mailings constitute "fully protected" speech, so that § 3001(e)(2) amounts to an impermissible content-based restriction on such expression.[8] Appellants argue,[9] and the District Court held,[10] that the proposed mailings are all commercial speech. The application of § 3001(e)(2) to appellee's proposed mailings must be examined carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed.[11]

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[7] Our decisions have displayed a greater willingness to permit content-based restrictions when the expression at issue fell within certain special and limited categories. See, *e. g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340 (1974) (libel); *Miller* v. *California*, 413 U. S. 15 (1973) (obscenity); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572–573 (1942) (fighting words).

Most of appellee's mailings fall within the core notion of commercial speech—"speech which does 'no more than propose a commercial transaction.'" *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc., supra,* at 762, quoting *Pittsburgh Press Co.* v. *Human Relations Comm'n,* 413 U. S. 376, 385 (1973).[12] Youngs' informational pamphlets, however, cannot be characterized merely as proposals to engage in commercial transactions. Their proper classification as commercial or noncommercial speech thus presents a closer question. The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. See *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 265–266 (1964). Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech.[13] See *Associated Students for Univ. of Cal. at Riverside* v. *Attorney General,*

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[8] Brief for Appellee 17; see *id.,* at 12, 13, 15, 20, 25–31, 31–32.

[9] See Brief for Appellants 13–14, n. 6; Reply Brief for Appellants 1 ("We do not suggest that a prohibition comparable to Section 3001(e)(2) can be applied to fully protected, noncommercial speech").

[10] 526 F. Supp., at 826.

[11] Cf. *Ohralik* v. *Ohio State Bar Assn.,* 436 U. S. 447, 456 (1978). To the extent any of appellee's mailings could be considered noncommercial speech, our conclusion that § 3001(e)(2) is unconstitutional as applied would be reinforced.

[12] For example, the drugstore flyer consists primarily of price and quantity information.

[13] One of the informational pamphlets, "Condoms and Human Sexuality," specifically refers to a number of Trojan-brand condoms manufactured by appellee and describes the advantages of each type.

The other informational pamphlet, "Plain Talk about Venereal Disease," repeatedly discusses condoms without any specific reference to those man-

368 F. Supp. 11, 24 (CD Cal. 1973). Finally, the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech. See *Bigelow* v. *Virginia*, 421 U. S., at 818; *Ginzburg* v. *United States*, 383 U. S. 463, 474 (1966); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940).

The combination of *all* these characteristics, however, provides strong support for the District Court's conclusion that the informational pamphlets are properly characterized as commercial speech.[14] The mailings constitute commercial speech notwithstanding the fact that they contain discussions

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ufactured by appellee. The only reference to appellee's products is contained at the very bottom of the last page, where appellee is identified as the distributor of Trojan-brand prophylactics. That a product is referred to generically does not, however, remove it from the realm of commercial speech. For example, a company with sufficient control of the market for a product may be able to promote the product without reference to its own brand names. Or a trade association may make statements about a product without reference to specific brand names. See, *e. g.*, *National Comm'n on Egg Nutrition* v. *FTC*, 570 F. 2d 157 (CA7 1977) (enforcing in part a Federal Trade Commission order prohibiting false and misleading advertising by an egg industry trade association concerning the relationship between cholesterol, eggs, and heart disease). In this case, Youngs describes itself as "the leader in the manufacture and sale" of contraceptives. Brief for Appellee 3.

[14] See Note, First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine, 44 U. Chi. L. Rev. 205, 236 (1976). Of course, a different conclusion may be appropriate in a case where the pamphlet advertises an activity itself protected by the First Amendment. See *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943) (advertisement for religious book cannot be regulated as commercial speech); *Jamison* v. *Texas*, 318 U. S. 413 (1943). This case raises no such issues. Nor do we mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial. For example, we express no opinion as to whether reference to any particular product or service is a necessary element of commercial speech. See Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, Sourcebook on Corporate Image and Corporate Advocacy Advertising, 95th Cong., 2d Sess., 1149–1337 (Comm. Print 1978) (FTC Memorandum concerning corporate image advertising).

of important public issues[15] such as venereal disease and family planning. We have made clear that advertising which "links a product to a current public debate" is not thereby entitled to the constitutional protection afforded noncommercial speech. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York,* 447 U. S., at 563, n. 5. A company has the full panoply of protections available to its direct comments on public issues,[16] so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions. See *ibid.* Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues. Cf. *Metromedia, Inc.* v. *San Diego,* 453 U. S. 490, 540 (1981) (BRENNAN, J., concurring in judgment).

We conclude, therefore, that all of the mailings in this case are entitled to the qualified but nonetheless substantial protection accorded to commercial speech.

III

"The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York,* 447 U. S., at 563. In *Central Hudson* we adopted a four-part analysis for assessing the validity of restrictions on commercial speech. First, we determine whether the expression is constitutionally protected. For commercial speech to receive such protection, "it at least must concern lawful activity and not be misleading." *Id.*, at 566. Second, we ask whether the governmental interest is substantial. If so, we must then determine whether the regulation directly advances the government interest asserted, and whether it is not more extensive than necessary to serve that interest. *Ibid.* Applying this analysis, we conclude that § 3001(e)(2) is unconstitutional as applied to appellee's mailings.

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[15] Cf. *Time, Inc.* v. *Hill,* 385 U. S. 374, 388 (1967), quoting *Thornhill* v. *Alabama,* 310 U. S. 88, 102 (1940) (defining public issues as those "about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period").

[16] See *Consolidated Edison Co.* v. *Public Service Comm'n of New York,* 447 U. S. 530 (1980).

We turn first to the protection afforded by the First Amendment. The State may deal effectively with false, deceptive, or misleading sales techniques. *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S., at 771–772. The State may also prohibit commercial speech related to illegal behavior. *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S., at 388. In this case, however, appellants have never claimed that Youngs' proposed mailings fall into any of these categories. To the contrary, advertising for contraceptives not only implicates "'substantial individual and societal interests'" in the free flow of commercial information, but also relates to activity which is protected from unwarranted state interference. See *Carey* v. *Population Services International*, 431 U. S. 678, 700–701 (1977), quoting *Virginia Pharmacy Board*, *supra*, at 760, 763–766.[17] Youngs' proposed commercial speech is therefore clearly protected by the First Amendment. Indeed, where—as in this case—a speaker desires to convey truthful information relevant to important social issues such as family planning and the prevention of venereal disease, we have previously found the First Amendment interest served by such speech paramount. See *Carey* v. *Population Services International*, *supra*; *Bigelow* v. *Virginia*, *supra*.[18]

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[17] See also *Eisenstadt* v. *Baird*, 405 U. S. 438, 453 (1972); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965).

[18] Appellants argue that § 3001(e)(2) does not interfere "significantly" with free speech because the statute applies only to unsolicited mailings and does not bar other channels of communication. See Brief for Appellants 16–24. However, this Court has previously declared that "one is not to have the exercise of his liberty of expression in appropriate places

We must next determine whether the Government's interest in prohibiting the mailing of unsolicited contraceptive advertisements is a substantial one. The prohibition in § 3001(e)(2) originated in 1873 as part of the Comstock Act, a criminal statute designed "for the suppression of Trade in and Circulation of obscene Literature and Articles of immoral Use." Act of Mar. 3, 1873, ch. 258, § 2, 17 Stat. 599.[19] Appellants do not purport to rely on justifications for the

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abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U. S. 147, 163 (1939). See *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 757, n. 15 (1976). Nor is the restriction on the use of the mails an insignificant one. See *Blount* v. *Rizzi*, 400 U. S. 410, 416 (1971), quoting *Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407, 437 (1921) (Holmes, J., dissenting) ("The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues . . ."). The argument that individuals can still request that they be sent appellee's mailings, Brief for Appellants 19, does little to bolster appellants' position. See *Lamont* v. *Postmaster General*, 381 U. S. 301, 307 (1965) (Government's imposition of affirmative obligations on addressee to receive mail constitutes an abridgment of the addressee's First Amendment rights).

Of course, the availability of alternative means of communication is relevant to an analysis of "time, place, and manner" restrictions. See *Consolidated Edison Co.* v. *Public Service Comm'n of New York*, *supra*, at 541, n. 10; *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 93 (1977). Appellants do not, however, attempt to justify § 3001(e)(2) as a time, place, or manner restriction. Nor would such a characterization be tenable in light of § 3001(e)(2)'s content-based prohibition. See *Consolidated Edison Co.* v. *Public Service Comm'n of New York*, *supra*, at 536; *Linmark Associates, Inc.* v. *Willingboro*, *supra*, at 93–94; *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 209 (1975).

[19] The driving force behind § 3001(e)(2) was Anthony Comstock, who in his diary referred to the 1873 Act as "his law." See Paul, The Post Office and Non-Mailability of Obscenity: An Historical Note, 8 UCLA L. Rev. 44, 57 (1961). Comstock was a prominent antivice crusader who believed that "anything remotely touching upon sex was . . . obscene." H. Broun & M. Leech, Anthony Comstock 265 (1927). See *Poe* v. *Ullman*, 367 U. S. 497, 520, n. 10 (1961) (Douglas, J., dissenting). The original prohibition was recodified and reenacted on a number of occasions, but

statute offered during the 19th century.[20] Instead, they advance interests that concededly were not asserted when the prohibition was enacted into law.[21] This reliance is permissible since the insufficiency of the original motivation does not diminish other interests that the restriction may now serve. See *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S., at 460. Cf. *Doe* v. *Bolton*, 410 U. S. 179, 190–191 (1973) (a State may readjust its views and emphases in light of modern knowledge).

In particular, appellants assert that the statute (1) shields recipients of mail from materials that they are likely to find offensive and (2) aids parents' efforts to control the manner in which their children become informed about sensitive and important subjects such as birth control.[22] The first of these interests carries little weight. In striking down a state prohibition of contraceptive advertisements in *Carey* v. *Population Services International*, *supra*, we stated that offensiveness was "classically not [a] justificatio[n] validating the suppression of expression protected by the First Amendment. At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." 431 U. S., at 701.[23] We specifically declined to recognize a dis-

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its thrust remained the same—"to prevent the mails from being used to corrupt the public morals." S. Rep. No. 113, 84th Cong., 1st Sess., 1 (1955). In 1970 Congress amended the law by striking the blanket prohibitions on the mailing of all advertisements for contraceptives, but it retained without any real discussion the ban on unsolicited advertisements. See, *e. g.*, S. Rep. No. 91–1472, p. 2 (1970).

[20] The party seeking to uphold a restriction on commercial speech carries the burden of justifying it. See *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 570 (1980); *Linmark Associates, Inc.* v. *Willingboro*, *supra*, at 95.

[21] See Brief for Appellants 24 ("Congress did not announce these interests in the legislative history when it enacted Section 3001(e)").

[22] See *id.*, at 24–33.

[23] See, *e. g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 915–920 (1982); *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 419 (1971); *Cohen* v. *California*, 403 U. S. 15 (1971).

tinction between commercial and noncommercial speech that would render this interest a sufficient justification for a prohibition of commercial speech. *Id.*, at 701, n. 28.

Recognizing that their reliance on this interest is "problematic,"[24] appellants attempt to avoid the clear import of *Carey* by emphasizing that § 3001(e)(2) is aimed at the mailing of materials to the home. We have, of course, recognized the important interest in allowing addressees to give notice to a mailer that they wish no further mailings which, in their sole discretion, they believe to be erotically arousing or sexually provocative. See *Rowan* v. *Post Office Department*, 397 U. S. 728, 737 (1970) (upholding the constitutionality of 39 U. S. C. § 3008).[25] But we have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended. The First Amendment "does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech." *Consolidated Edison Co.* v. *Public Service Comm'n of New York*, 447 U. S., at 542. Recipients of objectionable mailings, however, may "'effectively avoid further bombardment of their sensibilities simply by averting their eyes.'" *Ibid.*, quoting *Cohen* v. *California*, 403 U. S. 15, 21 (1971). Consequently, the "short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned." *Lamont* v. *Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (SDNY), summarily aff'd, 386 F. 2d 449 (CA2 1967), cert. denied, 391 U. S. 915 (1968).

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[24] Brief for Appellants 30.

[25] Title 39 U. S. C. § 3008, a prohibition of "pandering advertisements," permits any householder to insulate himself from advertisements that offer for sale "matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative." § 3008(a). The addressee's rights are absolute and "unlimited; he may prohibit the mailing of a dry goods catalog because he objects to the contents—or indeed the text of the language touting the merchandise." *Rowan*, 397 U. S., at 737.

The second interest asserted by appellants—aiding parents' efforts to discuss birth control with their children—is undoubtedly substantial. "[P]arents have an important 'guiding role' to play in the upbringing of their children . . . which presumptively includes counseling them on important decisions." *H. L.* v. *Matheson*, 450 U. S. 398, 410 (1981), quoting *Bellotti* v. *Baird*, 443 U. S. 622, 637 (1979). As a *means* of effectuating this interest, however, § 3001(e)(2) fails to withstand scrutiny.

To begin with, § 3001(e)(2) provides only the most limited incremental support for the interest asserted. We can reasonably assume that parents already exercise substantial control over the disposition of mail once it enters their mailboxes. Under 39 U. S. C. § 3008, parents can also exercise control over information that flows into their mailboxes. And parents must already cope with the multitude of external stimuli that color their children's perception of sensitive subjects.[26] Under these circumstances, a ban on unsolicited advertisements serves only to assist those parents who desire to keep their children from confronting such mailings, who are otherwise unable to do so, and whose children have remained relatively free from such stimuli.

This marginal degree of protection is achieved by purging all mailboxes of unsolicited material that is entirely suitable for adults. We have previously made clear that a restriction of this scope is more extensive than the Constitution permits, for the government may not "reduce the adult population . . . to reading only what is fit for children." *Butler* v. *Michigan*,

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[26] For example, many magazines contain advertisements for contraceptives. See M. Redford, G. Duncan, & D. Prager, The Condom: Increasing Utilization in the United States 145 (1974) (ads accepted in Family Health, Psychology Today, and Ladies' Home Journal in 1970). Section 3001(e)(2) itself permits the mailing of publications containing contraceptive advertisements to subscribers. Similarly, drugstores commonly display contraceptives. And minors taking a course in sex education will undoubtedly be exposed to the subject of contraception.

352 U. S. 380, 383 (1957).[27] The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox. In *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978), this Court did recognize that the Government's interest in protecting the young justified special treatment of an afternoon broadcast heard by adults as well as children.[28] At the same time, the majority "emphasize[d] the narrowness of our holding," *id.*, at 750, explaining that broadcasting is "*uniquely* pervasive" and that it is "*uniquely* accessible to children, even those too young to read." *Id.*, at 748–749 (emphasis added). The receipt of mail is far less intrusive and uncontrollable. Our decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media[29] does not readily translate into a justification for regulation of other means of communication. See *Consolidated Edison Co.* v. *Public Service Comm'n of New York*, *supra*, at 542–543; *FCC* v. *Pacifica Foundation*, *supra*, at 748 (broadcasting has received the most limited First Amendment protection).

Section 3001(e)(2) is also defective because it denies to parents truthful information bearing on their ability to discuss birth control and to make informed decisions in this area.[30]

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[27] In *Butler* this Court declared unconstitutional a Michigan statute that banned reading materials inappropriate for children. The legislation was deemed not "reasonably restricted" to the evil it sought to address; rather, the effect of the statute was "to burn the house to roast the pig." 352 U. S., at 383.

[28] See *New York* v. *Ferber*, 458 U. S. 747, 756–758 (1982).

[29] See *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 386–390 (1969).

[30] The statute also quite clearly denies information to minors, who are entitled to "a significant measure of First Amendment protection." *Erznoznik* v. *City of Jacksonville*, 422 U. S., at 212. See *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969). The right to privacy in matters affecting procreation also applies to minors, *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 72–75 (1976), so that the State could not ban the distribution of contraceptives to minors, see *Carey* v. *Population Services International*, 431 U. S. 678, 694 (1977) (plurality

See *Associated Students for Univ. of Cal. at Riverside* v. *Attorney General*, 368 F. Supp., at 21. Cf. *Carey* v. *Population Services International*, 431 U. S., at 708 (POWELL, J., concurring in part and concurring in judgment) (provision prohibiting parents from distributing contraceptives to children constitutes "direct interference with . . . parental guidance"). Because the proscribed information "may bear on one of the most important decisions" parents have a right to make, the restriction of "the free flow of truthful information" constitutes a "basic" constitutional defect regardless of the strength of the government's interest. *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 95–96 (1977).

IV

We thus conclude that the justifications offered by appellants are insufficient to warrant the sweeping prohibition on the mailing of unsolicited contraceptive advertisements. As applied to appellee's mailings, § 3001(e)(2) is unconstitutional. The judgment of the District Court is therefore

Affirmed.

JUSTICE BRENNAN took no part in the decision of this case.

JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

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opinion). We need not rely on such considerations in this case because of the impact of the statute on the flow of information to parents. Yet it cannot go without notice that adolescent children apparently have a pressing need for information about contraception. Available data indicate that, in 1978, over one-third of all females aged 13–19 (approximately five million people) were sexually active. Dryfoos, Contraceptive Use, Pregnancy Intentions and Pregnancy Outcomes Among U. S. Women, 14 Family Planning Perspectives 81, 83 (1982). Approximately 30% of these sexually active teenage females became pregnant during 1978; over 70% of these pregnancies (roughly 1.2 million) were unintended. *Id.*, at 88. Almost half a million teenagers had abortions during 1978. *Ibid.*

I agree that the judgment should be affirmed, but my reasoning differs from that of the Court. The right to use the mails is undoubtedly protected by the First Amendment, *Blount* v. *Rizzi*, 400 U. S. 410 (1971). But because the home mailbox has features which distinguish it from a public hall or public park, where it may be assumed that all who are present wish to hear the views of the particular speaker then on the rostrum, it cannot be totally assimilated for purposes of analysis with these traditional public forums. Several people within a family or living group may have free access to a mailbox, including minor children; and obviously not every piece of mail received has been either expressly or impliedly solicited. It is the unsolicited mass mailings sent by appellee designed to promote the use of condoms that gives rise to this litigation.

Our earlier cases have developed an analytic framework for commercial speech cases.

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 566 (1980).

The material that Youngs seeks to mail concerns lawful activity and is not misleading. The Postal Service does not contend otherwise.

The Postal Service does contend that the Government has substantial interests in "aiding parents' efforts to discuss sensitive and important subjects such as birth control with their children," Brief for Appellants 25, and in preventing material that the recipient may find offensive from entering the home on an unsolicited basis. *Id.*, at 30. The Government is entitled, the argument goes, to help individuals shield their families and homes from advertisements for contraceptives.[1]

The first of these interests is undoubtedly substantial. Contraception is an important and sensitive subject, and parents may well prefer that they provide their children with information on contraception in their own way. "[P]arents have an important 'guiding role' to play in the upbringing of their children . . . which presumptively includes counseling them on important decisions." *H. L.* v. *Matheson*, 450 U. S. 398, 410 (1981), quoting *Bellotti* v. *Baird*, 443 U. S. 622, 637 (1979). For this reason, among others, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. . . . The legislature could properly conclude that parents . . . , who have this primary responsibility for children's well being are entitled to the support of laws designed to aid discharge of that responsibility." *Ginsberg* v. *New York*, 390 U. S. 629, 639 (1968).

The second interest advanced by the Postal Service is also substantial. We have often recognized that individuals have a legitimate "right to be left alone" "in the privacy of the home," *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 748

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[1] The Postal Service acknowledges that these justifications were not the reasons why § 3001(e)(2) was originally enacted. This provision began as part of the Comstock Act, a statute enacted "for the suppression of Trade in and Circulation of obscene Literature and Articles of immoral Use." Act of Mar. 3, 1873, ch. 258, § 2, 17 Stat. 599. The Postal Service is entitled to rely on legitimate interests that the statute now serves, even if the original reasons for enacting the statute would not suffice to support it against a First Amendment challenge. *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 460 (1978). See also *Doe* v. *Bolton*, 410 U. S. 179, 190–191 (1973) (a State may readjust its views and emphases in light of modern knowledge).

(1978), "the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds." *Id.*, at 759 (opinion of POWELL, J.). Accord, *Rowan* v. *Post Office Dept.*, 397 U. S. 728, 736–738 (1970). The Government may properly act to protect people from unreasonable intrusions into their homes.

The questions whether § 3001(e)(2) directly advances these interests, and whether it is more extensive than necessary, are more problematic. Under 39 U. S. C. § 3008, an individual can have his name removed from Youngs' mailing list if he so wishes. See *Rowan* v. *Post Office Dept.*, *supra* (holding § 3008 constitutional). Thus, individuals are able to avoid the information in Youngs' advertisements after one exposure. Furthermore, as we noted in *Consolidated Edison Co.* v. *Public Service Comm'n of New York*, 447 U. S. 530, 542 (1980), the recipient of Youngs' advertising "may escape exposure to objectionable material simply by transferring [it] from envelope to wastebasket."[2] Therefore a mailed advertisement is significantly less intrusive than the daytime broadcast at issue in *Pacifica* or the sound truck at issue in *Kovacs* v. *Cooper*, 336 U. S. 77 (1949). See *Consolidated Edison*, 447 U. S., at 542–543. Where the recipients can "'effectively avoid further bombardment of their sensibilities simply by averting their eyes,'" *id.*, at 542, quoting *Cohen* v. *California*, 403 U. S. 15, 21 (1971), a more substantial governmental interest is necessary to justify restrictions on speech.

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[2] Under the restrictions imposed by the District Court, see *ante*, at 64, n. 5, the recipient will be explicitly informed of his right under § 3008. He will also know the nature of Youngs' mailing without opening the envelope, and thus be able to avoid the advertisement entirely by transferring it directly from mailbox to wastebasket.

Youngs did not file a cross-appeal challenging these restrictions, so I see no occasion to consider whether the District Court acted properly. Nor would I consider whether these restrictions would be valid if Congress were to enact them.

Although § 3001(e)(2) does advance the interest in permitting parents to guide their children's education concerning contraception, it also inhibits that interest by denying parents access to information about birth control that might help them make informed decisions. This statute acts "to prevent [people] from obtaining certain information." *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 96 (1977). The First Amendment, which was designed to prevent the Government from suppressing information, requires us "to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 770 (1976).

Section 3001(e)(2) is also broader than is necessary because it completely bans from the mail unsolicited materials that are suitable for adults. The Government may not "reduce the adult population . . . to reading only what is fit for children." *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957). Narrower restrictions, such as the provisions of 39 U. S. C. § 3008 and restrictions of the kind suggested by the District Court in this case, can fully serve the Government's interests.

The Postal Service argues that Youngs can obtain permission to send its advertisements by conducting a "premailing." Youngs could send letters to the general public, asking whether they would be willing to receive information about contraceptives, and send advertisements only to those who respond. In a similar vein, the Postal Service argues that Youngs can communicate with the public otherwise than through the mail.[3] Both of these arguments fall wide of the mark. A prohibition on the use of the mails is a significant restriction of First Amendment rights. We have noted that "'[t]he United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues.'" *Blount* v. *Rizzi*, 400 U. S., at 416, quoting *Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407, 437 (1921) (Holmes, J., dissenting). And First Amendment freedoms would be of little value if speakers had to obtain permission of their audiences before advancing particular viewpoints. Cf. *Lamont* v. *Postmaster General*, 381 U. S. 301 (1965) (statute requiring Post Office to obtain authorization from addressee before delivering certain types of mail violates addressee's First Amendment rights).

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[3] See generally, *e. g.*, The Washington Post, May 4, 1983, p. B20 (drugstore advertisement for numerous items, including condoms manufactured by Youngs and contraceptive jelly).

Thus, under this Court's cases the intrusion generated by Youngs' proposed advertising is relatively small, and the restriction imposed by § 3001(e)(2) is relatively large. Although this restriction directly advances weighty governmental interests, it is somewhat more extensive than is necessary to serve those interests. On balance I conclude that this restriction on Youngs' commercial speech[4] has not been adequately justified. Section 3001(e)(2) therefore violates the First Amendment as applied to Youngs and to material of the type Youngs has indicated that it plans to send, and I agree that the judgment of the District Court should be affirmed.

JUSTICE STEVENS, concurring in the judgment.

Two aspects of the Court's opinion merit further comment: (1) its conclusion that all of the communications at issue are properly classified as "commercial speech" (*ante*, at 68); and (2) its virtually complete rejection of offensiveness as a possibly legitimate justification for the suppression of speech (*ante*, at 72). My views are somewhat different from the Court's on both of these matters.

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[4] Since the Court finds § 3001(e)(2) invalid under the cases involving commercial speech, I would not reach Youngs' argument that its materials are entitled to the broader protection afforded noncommercial speech.

I

Even if it may not intend to do so, the Court's opinion creates the impression that "commercial speech" is a fairly definite category of communication that is protected by a fairly definite set of rules that differ from those protecting other categories of speech. That impression may not be wholly warranted. Moreover, as I have previously suggested, we must be wary of unnecessary insistence on rigid classifications, lest speech entitled to "constitutional protection be inadvertently suppressed." *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 579 (1980) (STEVENS, J., concurring in judgment).

I agree, of course, that the commercial aspects of a message may provide a justification for regulation that is not present when the communication has no commercial character. The interest in protecting consumers from commercial harm justifies a requirement that advertising be truthful; no such interest applies to fairy tales or soap operas. But advertisements may be complex mixtures of commercial and noncommercial elements: the noncommercial message does not obviate the need for appropriate commercial regulation (see *ante*, at 68); conversely, the commercial element does not necessarily provide a valid basis for noncommercial censorship.

Appellee's pamphlet entitled "Plain Talk about Venereal Disease" highlights the classification problem. On the one hand, the pamphlet includes statements that implicitly extol the quality of the appellee's products.[1] A law that protects the public from suffering commercial harm as a result of such statements would appropriately be evaluated as a regulation of commercial speech. On the other hand, most of the pamphlet is devoted to a discussion of the symptoms, significant risks, and possibility of treatment for venereal disease.[2] That discussion does not appear to endanger any commercial interest whatsoever; it serves only to inform the public about a medical issue of regrettably great significance.

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[1] The pamphlet states that it was contributed by the appellee as a public service, identifying the brand name of appellee's products. It also states: "Ethical Manufacturers require strict standards of strength, durability, and reliability in manufacturing condoms. (prophylactics) Each condom

I have not yet been persuaded that the commercial motivation of an author is sufficient to alter the state's power to regulate speech. Anthony Comstock surely had a constitutional right to speak out against the use of contraceptives in his day. Like Comstock, many persons today are morally opposed to contraception, and the First Amendment commands the government to allow them to express their views in appropriate ways and in appropriate places. I believe that Amendment affords the same protection to this appellee's views regarding the hygienic and family planning advantages of its contraceptive products.

Because significant speech so often comprises both commercial and noncommercial elements, it may be more fruitful to focus on the nature of the challenged regulation rather

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must be individually tested to assure a quality condom." App. to Brief for Appellee 31.

[2] For example, the pamphlet includes the following question and answer: "WHAT ARE THE EARLY SYMPTOMS OR SIGNS OF SYPHILIS? "The first sign of infection is a single, painless sore where the germ has entered the body. This sore is called a Chancre (pronounced shank-er). It appears between two to six weeks after exposure to the infected person. This Chancre or sore will disappear even without treatment, but this only means that the disease has gone deeper into the body. *The disease is not cured.* The secondary stage of Syphilis which begins two to six months after the Chancre, can include skin rashes over all or part of the body, baldness, sore throat, fever and headaches. Even these will disappear without treatment, *but the disease is still in the body* . . . just waiting to create such 'final' problems as crippling the nervous system, syphilitic insanity, heart disease and death." *Id.*, at 28.

than the proper label for the communication. Cf. Farber, Commercial Speech and First Amendment Theory, 74 Nw. U. L. Rev. 372, 386–390 (1979). The statute at issue in this case prohibits the mailing of "[a]ny unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception." Any legitimate interests the statute may serve are unrelated to the prevention of harm to participants in commercial exchanges.[3] Thus, because it restricts speech by the appellee that has a significant noncommercial component, I have scrutinized this statute in the same manner as I would scrutinize a prohibition on unsolicited mailings by an organization with absolutely no commercial interest in the subject.

II

Assuming that this case deals only with commercial speech, the Court implies, if it does not actually hold, that the fact that protected speech may be offensive to some persons is not a "sufficient justification for a prohibition of commercial speech." *Ante*, at 72. I think it essential to emphasize once again, however, that

> "a communication may be offensive in two different ways. Independently of the message the speaker intends to convey, the form of his communication may be offensive—perhaps because it is too loud or too ugly in a particular setting. Other speeches, even though elegantly phrased in dulcet tones, are offensive simply because the listener disagrees with the speaker's message." *Consolidated Edison Co.* v. *Public Service Comm'n of New York*, 447 U. S. 530, 546–548 (1980) (STEVENS, J., concurring in judgment) (footnotes omitted).

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[3] Because the right to decide whether to bear or beget a child is constitutionally protected, a government may not justify inhibiting access to contraceptives by claiming that, by their very nature, they harm consumers. See *Carey* v. *Population Services International*, 431 U. S. 678 (1977).

It matters whether a law regulates communications for their ideas or for their style. Governmental suppression of a specific point of view strikes at the core of First Amendment values.[4] In contrast, regulations of form and context may strike a constitutionally appropriate balance between the advocate's right to convey a message and the recipient's interest in the quality of his environment:

> "The fact that the advertising of a particular subject matter is *sometimes* offensive does not deprive all such advertising of First Amendment protection; but it is equally clear to me that the existence of such protection does not deprive the State of all power to regulate such advertising in order to minimize its offensiveness. A picture which may appropriately be included in an instruction book may be excluded from a billboard." *Carey* v. *Population Services International*, 431 U. S. 678, 717 (1977) (opinion of STEVENS, J.).

The statute at issue in this case censors ideas, not style. It prohibits appellee from mailing any unsolicited advertisement of contraceptives, no matter how unobtrusive and tactful; yet it permits anyone to mail unsolicited advertisements of devices intended to facilitate conception, no matter how coarse or grotesque. It thus excludes one advocate from a forum to which adversaries have unlimited access. I concur in the Court's judgment that the First Amendment prohibits the application of the statute to these materials.

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[4] See *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 63 (1976) (opinion of STEVENS, J.).

SHAW, ACTING COMMISSIONER, NEW YORK STATE DIVISION OF HUMAN RIGHTS, ET AL. *v.* DELTA AIR LINES, INC., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 81–1578. Argued January 10, 1983—Decided June 24, 1983*

New York's Human Rights Law forbids discrimination in employee benefit plans on the basis of pregnancy, and its Disability Benefits Law requires employers to pay sick-leave benefits to employees unable to work because of pregnancy. Section 514(a) of the federal Employee Retirement Income Security Act of 1974 (ERISA) provides, with enumerated exceptions, that ERISA shall supersede "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits. Prior to the effective date of the Pregnancy Discrimination Act of 1978 (PDA), which made discrimination based on pregnancy unlawful under Title VII of the Civil Rights Act of 1964, appellee employers had welfare benefit plans subject to ERISA that did not provide benefits to employees disabled by pregnancy. Appellees brought three separate declaratory judgment actions in Federal District Court, alleging that the Human Rights Law was pre-empted by ERISA. Appellee airlines also alleged that the Disability Benefits Law was pre-empted. The District Court in each case held that the Human Rights Law was pre-empted, at least insofar as it required the provision of pregnancy benefits prior to the effective date of the PDA. As to appellee airlines' challenge to the Disability Benefits Law, the District Court construed § 4(b)(3) of ERISA as exempting from ERISA coverage those provisions of an employee benefit plan maintained to comply with state disability insurance laws, and, because it concluded that appellees would have provided pregnancy benefits solely to comply with the Disability Benefits Law, the court dismissed the portion of the complaint seeking relief from that law. The Court of Appeals affirmed as to the Human

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*Together with *Shaw, Acting Commissioner, New York State Division of Human Rights* v. *Burroughs Corp.*; and *Shaw, Acting Commissioner, New York State Division of Human Rights, et al.* v. *Metropolitan Life Insurance Co.*, also on appeal from the same court (see this Court's Rule 10.6).

Rights Law. With respect to the Disability Benefits Law, the Court of Appeals held that § 4(b)(3)'s exemption from pre-emption applied only when a benefit plan, "as an integral unit," is maintained solely to comply with the disability law. The Court of Appeals remanded for a determination whether appellee airlines provided benefits through such plans, in which event the Disability Benefits Law would be enforceable, or through portions of comprehensive plans, in which case ERISA regulation would be exclusive.

Held:

1. Given § 514(a)'s plain language, and ERISA's structure and legislative history, both the Human Rights Law and the Disability Benefits Law "relate to any employee benefit plan" within the meaning of § 514(a). Pp. 95–100.

2. The Human Rights Law is pre-empted with respect to ERISA benefit plans only insofar as it prohibits practices that are lawful under federal law. Pp. 100–106.

(a) Section 514(d) of ERISA provides that § 514(a) shall not "be construed to . . . modify [or] impair . . . any law of the United States." To the extent that the Human Rights Law provides a means of enforcing Title VII's commands, pre-emption of the Human Rights Law would modify and impair federal law within the meaning of § 514(d). State fair employment laws and administrative remedies play a significant role in the federal enforcement scheme under Title VII. If ERISA were interpreted to pre-empt the Human Rights Law entirely with respect to covered benefit plans, the State no longer could prohibit employment practices relating to such plans and the state agency no longer would be authorized to grant relief. The Equal Employment Opportunity Commission thus would be unable to refer claims involving covered plans to the state agency. This would frustrate the goal of encouraging joint state/federal enforcement of Title VII. Pp. 100–102.

(b) Insofar as state laws prohibit employment practices that are lawful under Title VII, however, pre-emption would not impair Title VII within the meaning of § 514(d). While § 514(d) may operate to exempt state laws upon which federal laws, such as Title VII, depend for their enforcement, the combination of Congress' enactment of § 514(a)'s all-inclusive pre-emption provision and its enumeration of narrow, specific exceptions to that provision militate against expanding § 514(d) into a more general saving clause. Section 514(d)'s limited legislative history is entirely consistent with Congress' goal of ensuring that employers would not face conflicting or inconsistent state and local regulation of employee benefit plans. Pp. 103–106.

3. The Disability Benefits Law is not pre-empted by ERISA. Pp. 106–108.

(a) Section 4(b)(3) of ERISA, which exempts from ERISA coverage "any employee benefit plan . . . maintained solely for the purpose of complying with applicable . . . disability insurance laws," excludes "plans," not portions of plans, from ERISA coverage. Hence, those portions of appellee airlines' multibenefit plans maintained to comply with the Disability Benefits Law are not exempt from ERISA and are not subject to state regulation. Section 4(b)(3)'s use of the word "solely" demonstrates that the purpose of the entire plan must be to comply with an applicable disability insurance law. Thus, only separately administered disability plans maintained solely to comply with the Disability Benefits Law are exempt from ERISA coverage under § 4(b)(3). Pp. 106–108.

(b) A State may require an employer to maintain a separate disability plan, but the fact that state law permits employers to meet their state-law obligations by including disability benefits in a multibenefit ERISA plan does not make the state law wholly unenforceable as to employers who choose that option. P. 108.

650 F. 2d 1287 and 666 F. 2d 21; and 666 F. 2d 27 and 666 F. 2d 26, affirmed in part, vacated in part, and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Deborah Bachrach, Assistant Attorney General of New York, argued the cause for appellants. With her on the briefs were *Robert Abrams*, Attorney General, and *Peter Bienstock, Robert Hermann, Peter H. Schiff*, and *Daniel Berger*, Assistant Attorneys General.

Gordon Dean Booth, Jr., argued the cause for appellees. With him on the brief for appellees Delta Air Lines, Inc., et al. was *William H. Boice*. *Robert C. Bernius, William E. McKnight*, and *Robb M. Jones* filed a brief for appellee Burroughs Corp. *Edward Silver, Sara S. Portnoy*, and *Jeffrey A. Mishkin* filed a brief for appellee Metropolitan Life Insurance Co.†

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†Briefs of *amici curiae* urging reversal were filed by *LeRoy S. Zimmerman*, Attorney General, and *Ellen M. Doyle* for the Commonwealth of Pennsylvania et al.; by *Mary L. Heen, Joan E. Bertin*, and *Isabelle Katz Pinzler* for the American Civil Liberties Union et al.; and by *J. Albert Woll, Marsha Berzon, Laurence Gold*, and *John Fillion* for the American Federation of Labor and Congress of Industrial Organizations et al.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General Lee, Stuart A. Smith, T. Timothy Ryan, Jr., Kerry L. Adams*, and *John*

JUSTICE BLACKMUN delivered the opinion of the Court.

New York's Human Rights Law forbids discrimination in employment, including discrimination in employee benefit plans on the basis of pregnancy. The State's Disability Benefits Law requires employers to pay sick-leave benefits to employees unable to work because of pregnancy or other nonoccupational disabilities. The question before us is whether these New York laws are pre-empted by the federal Employee Retirement Income Security Act of 1974.

I

A

The Human Rights Law, N. Y. Exec. Law §§ 290–301 (McKinney 1982 and Supp. 1982–1983), is a comprehensive antidiscrimination statute prohibiting, among other practices, employment discrimination on the basis of sex. § 296.1 (a).[1] The New York Court of Appeals has held that a private employer whose employee benefit plan treats pregnancy differently from other nonoccupational disabilities engages in sex discrimination within the meaning of the Human Rights Law. *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Board*, 41 N. Y. 2d 84, 359 N. E. 2d 393 (1976). In contrast, two weeks before the decision in *Brooklyn Union Gas*, this Court ruled that discrimination based on pregnancy was not sex discrimination under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended,

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A. Bryson for the United States; by *Eugene B. Granof* and *George J. Pantos* for the ERISA Industry Committee et al.; and by *Walter P. DeForest* and *Stuart I. Saltman* for Westinghouse Electric Corp.

[1] Section 296.1 (McKinney 1982) provides:

"1. It shall be an unlawful discriminatory practice:

"(a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

42 U. S. C. § 2000e *et seq.* *General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976).[2] Congress overcame the *Gilbert* ruling by enacting § 1 of the Pregnancy Discrimination Act of 1978, 92 Stat. 2076, 42 U. S. C. § 2000e(k) (1976 ed., Supp. V), which added subsection (k) to § 701 of the Civil Rights Act of 1964.[3] See *Newport News Shipbuilding and Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 678 (1983). Until that Act took effect on April 29, 1979, see § 2(b), 92 Stat. 2076, the Human Rights Law in this respect had a reach broader than Title VII.

The Disability Benefits Law, N. Y. Work. Comp. Law §§ 200–242 (McKinney 1965 and Supp. 1982–1983), requires employers to pay certain benefits to employees unable to work because of nonoccupational injuries or illness. Disabled employees generally are entitled to receive the lesser of $95 per week or one-half their average weekly wage, for a maximum of 26 weeks in any 1-year period. §§ 204.2, 205.1. Until August 1977, the Disability Benefits Law provided that employees were not entitled to benefits for pregnancy-related disabilities. § 205.3 (McKinney 1965). From August 1977 to June 1981, employers were required to provide eight weeks of benefits for pregnancy-related disabilities.

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[2] The New York court in *Brooklyn Union Gas* noted the *Gilbert* decision, but declined to follow it in interpreting the analogous provision of the Human Rights Law. 41 N. Y. 2d, at 86, n. 1, 359 N. E. 2d, at 395, n. 1. Most state courts have done the same. See *Minnesota Mining & Manufacturing Co.* v. *State*, 289 N. W. 2d 396, 399, n. 2 (Minn. 1979) (collecting cases), appeal dism'd, 444 U. S. 1041 (1980).

[3] Subsection (k) provides in relevant part:

"The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise."

1977 N. Y. Laws, ch. 675, § 29 (formerly codified as N. Y. Work. Comp. Law § 205.3). This limitation was repealed in 1981, see 1981 N. Y. Laws, ch. 352, § 2, and the Disability Benefits Law now requires employers to provide the same benefits for pregnancy as for any other disability.[4]

B

The federal Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.* (1976 ed. and Supp. V), subjects to federal regulation plans providing employees with fringe benefits. ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans. See *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U. S. 359, 361–362 (1980); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S. 504, 510 (1981). The term "employee benefit plan" is defined as including both pension plans and welfare plans.[5] The statute imposes participation, funding, and vesting requirements on pension plans. §§201–306, 29 U. S. C. §§1051–1086 (1976 ed. and Supp. V). It also sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans. §§101–111, 401–414, 29 U. S. C. §§1021–1031, 1101–1114 (1976 ed. and Supp. V). ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits.

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[4] The current version of the Disability Benefits Law provides in relevant part:

"§ 204. Disability during employment

"1. Disability benefits shall be payable to an eligible employee for disabilities . . . beginning with the eighth consecutive day of disability and thereafter during the continuance of disability, subject to the limitations as to maximum and minimum amounts and duration and other conditions and limitations in this section and in sections two hundred five and two hundred six. . . .

"2. The weekly benefit which the disabled employee is entitled to receive for disability commencing on or after July first, nineteen hundred seventy-four shall be one-half of the employee's average weekly wage, but in no case shall such benefit exceed ninety-five dollars nor be less than twenty dollars; except that if the employee's average weekly wage is less than twenty dollars, his benefit shall be such average weekly wage. . . .

"§ 205. Disabilities and disability periods for which benefits are not payable

"No employee shall be entitled to benefits under this article:

"1. For more than twenty-six weeks during a period of fifty-two consecutive calendar weeks or during any one period of disability."

Section 514(a) of ERISA, 29 U. S. C. §1144(a), pre-empts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA.[6] State laws regulating insurance, banking, or securities are exempt from this pre-emption provision, as are generally applicable state criminal laws. §§514(b)(2)(A) and (b)(4), 29 U. S. C. §§1144(b)(2)(A) and (b)(4). Section 514(d), 29 U. S. C. §1144(d), moreover, provides that "[n]othing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." And §4(b)(3) of ERISA, 29 U. S. C. § 1003(b)(3), exempts from ERISA coverage employee benefit plans that are "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws."

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[5] ERISA §3(3), 29 U. S. C. §1002(3). An "employee pension benefit plan" provides income deferral or retirement income. §3(2), 29 U. S. C. §1002(2). An "employee welfare benefit plan" includes any program that provides benefits for contingencies such as illness, accident, disability, death, or unemployment. §3(1), 29 U. S. C. §1002(1).

[6] Section 514(a) provides:

"Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)."

The term "State law" includes "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." §514(c)(1), 29 U. S. C. §1144(c)(1). The term "State" includes "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title." §514(c)(2), 29 U. S. C. §1144(c)(2).

II

Appellees in this litigation, Delta Air Lines, Inc., and other airlines (Airlines), Burroughs Corporation (Burroughs), and Metropolitan Life Insurance Company (Metropolitan), provided their employees with various medical and disability benefits through welfare plans subject to ERISA. These plans, prior to the effective date of the Pregnancy Discrimination Act, did not provide benefits to employees disabled by pregnancy as required by the New York Human Rights Law and the State's Disability Benefits Law. Appellees brought three separate federal declaratory judgment actions against appellant state agencies and officials,[7] alleging that the Human Rights Law was pre-empted by ERISA. The Airlines in their action alleged that the Disability Benefits Law was similarly pre-empted.[8]

The United States District Court in each case held that the Human Rights Law was pre-empted, at least insofar as it required the provision of pregnancy benefits prior to the effective date of the Pregnancy Discrimination Act.[9] With respect to the Airlines' challenge to the Disability Benefits Law, the District Court construed § 4(b)(3) of ERISA as exempting from the federal statute "those provisions of an employee plan which are maintained to comply with" state disability insurance laws. *Delta Air Lines, Inc.* v. *Kramarsky*, 485 F. Supp. 300, 307 (SDNY 1980). Because it concluded that the Airlines would have provided pregnancy benefits solely to comply with the Disability Benefits Law, the court dismissed the portion of their complaint seeking relief from that law.

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[7] The Airlines brought their action in the United States District Court for the Southern District of New York and named as defendants the New York State Division of Human Rights, the Division's Commissioner, the Division's General Counsel, the New York State Workmen's Compensation Board, and the Board's Chairman. App. 28. Burroughs brought its action in the Western District of New York against only the Commissioner of the Division of Human Rights. *Id.*, at 81. Metropolitan, suing in the Southern District of New York, named the Commissioner, the Division, and the New York State Human Rights Appeal Board. *Id.*, at 88.

[8] The Airlines also contended that the Human Rights Law and Disability Benefits Law were pre-empted by the Railway Labor Act, 45 U. S. C. § 151 *et seq.*; the Equal Pay Act, 29 U. S. C. § 206(d); Exec. Order No. 11246, 3 CFR 339 (1964–1965 Comp.); and Title VII. These claims were resolved against the Airlines, see *Delta Air Lines, Inc.* v. *Kramarsky*, 666 F. 2d 21, 26, n. 2 (CA2 1981); *Delta Air Lines, Inc.* v. *Kramarsky*, 650 F. 2d 1287, 1296–1302 (CA2 1981), and are not before us.

The United States Court of Appeals for the Second Circuit affirmed as to the Human Rights Law. *Delta Air Lines, Inc.* v. *Kramarsky*, 666 F. 2d 21 (1981); *Metropolitan Life*

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[9] The opinion in the Airlines' case is reported as *Delta Air Lines, Inc.* v. *Kramarsky*, 485 F. Supp. 300 (SDNY 1980); the District Court opinions in the two other cases are not reported. In the Airlines' case, the District Court enjoined appellants from enforcing the Human Rights Law against the Airlines' benefit plans with respect to the period from December 20, 1976 (the date of the New York Court of Appeals' decision in *Brooklyn Union Gas*) to April 29, 1979 (the effective date of the federal Pregnancy Discrimination Act). See App. to Juris. Statement A75. As of the latter date, the court held, the Airlines' claims for relief were moot because federal law required the Airlines to include pregnancy disabilities in their employee benefit plans. 485 F. Supp., at 302.

In Burroughs' case, the District Court enjoined prosecution of Burroughs for its refusal to compensate New York employees for pregnancy-related disability claims between January 1, 1975 (the effective date of ERISA) and April 1, 1979 (which the court mistakenly believed to be the effective date of the Pregnancy Discrimination Act). App. to Juris. Statement A103–A104. In Metropolitan's case, the District Court enjoined enforcement of the Human Rights Law with respect to employee benefit plans subject to ERISA. The court's order was not limited to pregnancy benefits and did not refer specifically to any time period. *Id.*, at A119–A120.

The cases, of course, are not moot with respect to the period before the effective date of the Pregnancy Discrimination Act, since enforcement of the Human Rights Law would subject appellees to liability.

Insurance Co. v. *Kramarsky*, 666 F. 2d 26 (1981); *Burroughs Corp.* v. *Kramarsky*, 666 F. 2d 27 (1981).[10] Relying on this Court's decision in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S. 504 (1981), and on its own ruling in *Pervel Industries, Inc.* v. *Connecticut Commission on Human Rights & Opportunities*, 603 F. 2d 214 (1979), order aff'g 468 F. Supp. 490 (Conn. 1978), cert. denied, 444 U. S. 1031 (1980), the court held that § 514(a) of ERISA operated to pre-empt the Human Rights Law, and that § 514(d) did not save that law from pre-emption.[11] With respect to the Disability Benefits Law, the Court of Appeals had concluded earlier that § 4(b)(3)'s exemption from pre-emption applied only when a benefit plan, "as an integral unit," is maintained solely to comply with a disability law. *Delta Air Lines, Inc.* v. *Kramarsky*, 650 F. 2d 1287, 1304 (1981). The court remanded for inquiries into whether the Airlines provided disability benefits through plans constituting separate administrative units, in which event the Disability Benefits Law would be enforceable, or through portions of comprehensive benefit plans, in which case ERISA regulation would be exclusive.

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[10] The three cases were not consolidated on appeal, but were argued the same day. The court treated the Airlines' appeal as the "lead" case.

[11] Initially, the Court of Appeals had reversed the District Courts' holdings that ERISA pre-empted the Human Rights Law. *Delta Air Lines, Inc.* v. *Kramarsky*, 650 F. 2d 1287 (1981); *Burroughs Corp.* v. *Kramarsky*, 650 F. 2d 1308 (1981); *Metropolitan Life Insurance Co.* v. *Kramarsky*, 650 F. 2d 1309 (1981). Although *Pervel* ordinarily would have been controlling, the court concluded that it was bound by this Court's dismissals, for want of a substantial federal question, of the appeals in *Minnesota Mining & Manufacturing Co.* v. *State*, 289 N. W. 2d 396 (Minn. 1979), appeal dism'd, 444 U. S. 1041 (1980), and *Mountain States Telephone & Telegraph Co.* v. *Commissioner of Labor & Industry*, 187 Mont. 22, 608 P. 2d 1047 (1979), appeal dism'd, 445 U. S. 921 (1980). In those cases the state courts had determined that state fair employment laws similar to the Human Rights Law were not pre-empted by ERISA.

The Court of Appeals observed that this Court had denied certiorari in *Pervel*, which reached the opposite result, only a week before dismissing the appeal in *Minnesota Mining*. Understandably viewing this sequence of events as "rather mystifying," 650 F. 2d, at 1296, the court noted that dismissals of appeals are binding precedents for the lower courts, see *Hicks* v. *Miranda*, 422 U. S. 332, 343–345, and n. 14 (1975), while denials of certiorari have no precedential force. After this Court's decision in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S. 504 (1981), the Court of Appeals granted rehearing and returned to its *Pervel* reasoning, holding that *Alessi* was a "doctrinal development," see *Hicks* v. *Miranda*, 422 U. S., at 344–345, that warranted departure from the precedent set by the Court's summary dispositions. 666 F. 2d, at 25–26.

Because courts have disagreed about the scope of ERISA's pre-emption provisions,[12] and because of the continuing importance of the issues presented,[13] we noted probable jurisdiction in all three cases. 456 U. S. 924 (1982).

III

In deciding whether a federal law pre-empts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue. "Pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.' *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977)." *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 152–153 (1982). See *Exxon Corp.* v. *Eagerton*, 462 U. S.

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[12] See *Minnesota Mining & Manufacturing Co.* v. *State, supra; Mountain States Telephone & Telegraph Co.* v. *Commissioner of Labor & Industry, supra;* see also *Bucyrus-Erie Co.* v. *Department of Industry, Labor & Human Relations*, 599 F. 2d 205 (CA7 1979), cert. denied, 444 U. S. 1031 (1980).

[13] Under the Pregnancy Discrimination Act, the kind of discrimination at issue here is now unlawful regardless of state law. The controversy about the Human Rights Law has not thereby become less significant, however; the Human Rights Law and other state fair employment laws may contain proscriptions broader than Title VII in other respects, see, *e. g.*, N. Y. Exec. Law. § 296.1(a) (McKinney 1982) (prohibiting discrimination in employment based on marital status), and there is uncertainty about whether state fair employment laws may be enforced to the extent they prohibit the same practices as Title VII.

176, 180–182 (1983); *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 203–204 (1983). In these cases, we address the scope of several provisions of ERISA that speak expressly to the question of pre-emption. The issues are whether the Human Rights Law and Disability Benefits Law "relate to" employee benefit plans within the meaning of § 514(a), see n. 6, *supra*, and, if so, whether any exception in ERISA saves them from pre-emption.[14]

We have no difficulty in concluding that the Human Rights Law and Disability Benefits Law "relate to" employee benefit plans. The breadth of § 514(a)'s pre-emptive reach is apparent from that section's language.[15] A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.[16] Employing this definition, the Human Rights Law, which prohibits employers from structuring their employee benefit plans in a manner that discriminates on the basis of pregnancy, and the Disability Benefits Law, which requires employers to pay employees specific benefits, clearly "relate to" benefit plans.[17] We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980); see *North Dakota* v. *United States*, 460 U. S. 300,

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[14] The Court's decision today in *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, *ante*, p. 1, does not call into question the lower courts' jurisdiction to decide these cases. *Franchise Tax Board* was an action seeking a declaration that state laws were *not* pre-empted by ERISA. Here, in contrast, companies subject to ERISA regulation seek injunctions against enforcement of state laws they claim *are* pre-empted by ERISA, as well as declarations that those laws are pre-empted.

It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. See *Ex parte Young*, 209 U. S. 123, 160–162 (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U. S. C. § 1331 to resolve. See *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, 199–200 (1921); *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149, 152 (1908); see also *Franchise Tax Board*, *ante*, at 19–22, and n. 20; Note, Federal Jurisdiction over Declaratory Suits Challenging State Action, 79 Colum. L. Rev. 983, 996–1000 (1979). This Court, of course, frequently has resolved pre-emption disputes in a similar jurisdictional posture. See, *e. g.*, *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151 (1978); *Jones* v. *Rath Packing Co.*, 430 U. S. 519 (1977); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132 (1963); *Hines* v. *Davidowitz*, 312 U. S. 52 (1941).

[15] The Court recently considered § 514(a) in *Alessi*, *supra*. In that case, a New Jersey statute prohibited a method of computing pension benefits which, the Court found, Congress intended to permit when it enacted

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ERISA. Finding that Congress "meant to establish pension plan regulation as exclusively a federal concern," 451 U. S., at 523, and that the New Jersey law "eliminates one method for calculating pension benefits—integration—that is permitted by federal law," *id.*, at 524, the Court held that the law was pre-empted. The Court relied not on § 514(a)'s language and legislative history, but on the state law's frustration of congressional intent. That kind of tension is not present in these cases; while federal law did not prohibit pregnancy discrimination during the relevant period, Congress, in enacting ERISA, demonstrated no desire to permit it. *Alessi*'s recognition of the exclusive federal role in regulating benefit plans, therefore, is instructive but not dispositive. See also *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, *ante*, at 24, n. 26 (describing § 514(a) as a "virtually unique pre-emption provision"); *Allied Structural Steel Co.* v. *Spannaus*, 438 U. S. 234, 248, n. 21 (1978) (dictum).

[16] See Black's Law Dictionary 1158 (5th ed. 1979) ("Relate. To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with"). See also *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U. S. 689, 695 (1933).

[17] Accord, *Bucyrus-Erie Co.* v. *Department of Industry, Labor & Human Relations*, 599 F. 2d, at 208–210; *Pervel Industries, Inc.* v. *Connecticut Commission on Human Rights & Opportunities*, 468 F. Supp. 490, 492 (Conn. 1978), affirmance order, 603 F. 2d 214 (CA2 1979), cert. denied, 444 U. S. 1031 (1980).

Of course, § 514(a) pre-empts state laws only insofar as they relate to plans covered by ERISA. The Human Rights Law, for example, would be unaffected insofar as it prohibits employment discrimination in hiring, promotion, salary, and the like.

312 (1983); *Dickerson* v. *New Banner Institute, Inc.*, 460 U. S. 103, 110 (1983).

In fact, however, Congress used the words "relate to" in § 514(a) in their broad sense. To interpret § 514(a) to pre-empt only state laws specifically designed to affect employee benefit plans would be to ignore the remainder of § 514. It would have been unnecessary to exempt generally applicable state criminal statutes from pre-emption in § 514(b), for example, if § 514(a) applied only to state laws dealing specifically with ERISA plans.

Nor, given the legislative history, can § 514(a) be interpreted to pre-empt only state laws dealing with the subject matters covered by ERISA—reporting, disclosure, fiduciary responsibility, and the like. The bill that became ERISA originally contained a limited pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA.[18] The Conference Committee rejected these provisions in favor of the present language, and indicated that the section's pre-emptive scope was as broad as its language. See H. R. Conf. Rep. No. 93–1280, p. 383 (1974); S. Conf. Rep. No. 93–1090, p. 383 (1974).[19] Statements by the bill's sponsors during the subsequent debates stressed the breadth of federal pre-emption. Representative Dent, for example, stated:

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[18] The bill that passed the House, H. R. 2, 93d Cong., 2d Sess., § 514(a) (1974), 3 Legislative History of the Employee Retirement Income Security Act of 1974 (Committee Print compiled by the Senate Committee on Labor and Public Welfare), pp. 4057–4058 (1976) (Legislative History), provided that ERISA would supersede state laws "relat[ing] to the reporting and disclosure responsibilities, and fiduciary responsibilities, of persons acting on behalf of any employee benefit plan to which part 1 applies." The bill that passed the Senate, H. R. 2, 93d Cong, 2d Sess., § 699(a) (1974), 3 Legislative History 3820, provided for pre-emption of state laws "relat[ing] to the subject matters regulated by this Act or the Welfare and Pension Plans Disclosure Act."

[19] In deciding to pre-empt state laws relating to benefit plans, rather than those laws relating to subjects covered by ERISA, the Conference Committee rejected a much narrower administration proposal. The administration's recommendations to the conferees described the pre-emption provision of the House and Senate bills as "extremely vague" and "too broad," respectively, and suggested language making explicit the areas of

> "Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation." 120 Cong. Rec. 29197 (1974).

Senator Williams echoed these sentiments:

> "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law." *Id.*, at 29933.[20]

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state law to be pre-empted. Administration Recommendations to the House and Senate Conferees on H. R. 2 to Provide for Pension Reform 107–108, 3 Legislative History 5145–5146. The version of § 514(a) that emerged from Conference bore no resemblance to the administration proposal. See Hutchinson & Ifshin, Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974, 46 U. Chi. L. Rev. 23, 39–40, and n. 121 (1978).

[20] See also 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits):

"Both [original] House and Senate bills provided for preemption of State law, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily

Given the plain language of § 514(a), the structure of the Act, and its legislative history, we hold that the Human Rights Law and the Disability Benefits Law "relate to any employee benefit plan" within the meaning of ERISA's § 514(a).[21]

IV

We next consider whether any of the narrow exceptions to § 514(a) saves these laws from pre-emption.

A

Appellants argue that the Human Rights Law is exempt from pre-emption by § 514(d), which provides that § 514(a)

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contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.

"Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs."

Senator Javits noted that the conferees had assigned the Congressional Pension Task Force the responsibility of studying and evaluating ERISA pre-emption in order to determine whether modifications in the pre-emption policy would be necessary. *Ibid.* See ERISA §§ 3021, 3022(a)(4), 88 Stat. 999 (formerly codified as 29 U. S. C. §§ 1221, 1222(a)(5)). After a period of monitoring by the Task Force, and hearings by the Subcommittee on Labor Standards of the House Committee on Education and Labor, a Report was issued evaluating ERISA's pre-emption provisions. The Report expressed approval of ERISA's broad pre-emption of state law, explaining that "the Federal interest and the need for national uniformity are so great that enforcement of state regulation should be precluded." H. R. Rep. No. 94–1785, p. 47 (1977). The Report recommended only that the exceptions described in § 514(b) be narrowed still further. *Ibid.*

[21] Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law "relates to" the plan. Cf. *American Telephone and Telegraph Co.* v. *Merry*, 592 F. 2d 118, 121 (CA2 1979) (state garnishment of a spouse's pension income to enforce alimony and support orders is not pre-empted). The present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line.

shall not "be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States." According to appellants, pre-emption of state fair employment laws would impair and modify Title VII because it would change the means by which it is enforced.

State laws obviously play a significant role in the enforcement of Title VII. See, *e. g., Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461, 468–469, 472, 477 (1982); *id.*, at 504 (dissenting opinion); *New York Gaslight Club, Inc.* v. *Carey*, 447 U. S. 54, 63–65 (1980). Title VII expressly preserves nonconflicting state laws in its § 708:

> "Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title." 78 Stat. 262, 42 U. S. C. § 2000e–7.[22]

Moreover, Title VII requires recourse to available state administrative remedies. When an employment practice prohibited by Title VII is alleged to have occurred in a State or locality which prohibits the practice and has established an agency to enforce that prohibition, the Equal Employment Opportunity Commission (EEOC) refers the charges to the state agency. The EEOC may not actively process the charges "before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated." § 706(c), 86 Stat. 104, 42 U. S. C. § 2000e–5(c); see *Love* v. *Pullman Co.*, 404 U. S. 522 (1972). In its subsequent proceedings, the EEOC accords "substantial weight" to the state administrative determination. § 706(b), 86 Stat. 104, 42 U. S. C. § 2000e–5(b).

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[22] See also § 1104, 78 Stat. 268, 42 U. S. C. § 2000h–4. The Court of Appeals properly rejected the simplistic "double saving clause" argument—that because ERISA does not pre-empt Title VII, and Title VII does not pre-empt state fair employment laws, ERISA does not pre-empt such laws. 666 F. 2d, at 25–26. Title VII does not transform state fair employment laws into federal laws that § 514(d) saves from ERISA pre-emption. Furthermore, since Title VII's saving clause applies to all state laws with which it is not in conflict, rather than just to nondiscrimination laws, and since many federal laws contain nonpre-emption provisions, the double saving clause argument, taken to its logical extreme, would save almost all state laws from pre-emption. The question whether pre-emption of state fair employment laws would "impair" Title VII, in light of Title VII's reliance on state laws and agencies, is the more difficult question we address in the text.

Given the importance of state fair employment laws to the federal enforcement scheme, pre-emption of the Human Rights Law would impair Title VII to the extent that the Human Rights Law provides a means of enforcing Title VII's commands. Before the enactment of ERISA, an employee claiming discrimination in connection with a benefit plan would have had his complaint referred to the New York State Division of Human Rights. If ERISA were interpreted to pre-empt the Human Rights Law entirely with respect to covered benefit plans, the State no longer could prohibit the challenged employment practice and the state agency no longer would be authorized to grant relief. The EEOC thus would be unable to refer the claim to the state agency. This would frustrate the goal of encouraging joint state/federal enforcement of Title VII; an employee's only remedies for discrimination prohibited by Title VII in ERISA plans would be federal ones. Such a disruption of the enforcement scheme contemplated by Title VII would, in the words of § 514(d), "modify" and "impair" federal law.[23]

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[23] Pre-emption of this sort not only would eliminate a forum for resolving disputes that, in certain situations, may be more convenient than the EEOC, but also would substantially increase the EEOC's workload. Because the EEOC would be unable to refer claims to state agencies for initial processing, those claims that would have been settled at the state level

Insofar as state laws prohibit employment practices that are lawful under Title VII, however, pre-emption would not impair Title VII within the meaning of § 514(d). Although Title VII does not itself prevent States from extending their nondiscrimination laws to areas not covered by Title VII, see § 708, 78 Stat. 262, 42 U. S. C. § 2000e–7, it in no way depends on such extensions for its enforcement. Title VII would prohibit precisely the same employment practices, and be enforced in precisely the same manner, even if no State made additional employment practices unlawful. Quite simply, Title VII is neutral on the subject of all employment practices it does not prohibit.[24] We fail to see how federal

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would require the EEOC's attention. Claims that would not have been settled at the state level, but would have produced an administrative record, would come to the EEOC without such a record. The EEOC's options for coping with this added burden, barring discoveries of reserves in the agency budget, would be to devote less time to each individual case or to accept longer delays in handling cases. The inevitable result of complete pre-emption, in short, would be less effective enforcement of Title VII.

[24] Appellants argue that pre-emption of the Human Rights Law's prohibition of pregnancy discrimination would impair Title VII because that law encourages States to enact fair employment laws providing greater substantive protection than Title VII. See, *e. g.*, Tr. of Oral Arg. 6–7, 11. We have found no statutory language or legislative history suggesting that the federal interest in state fair employment laws extends any farther than saving such laws from pre-emption by Title VII itself. As the court stated in *Pervel*, 468 F. Supp., at 493, "Title VII did not create new authority for state anti-discrimination laws; it simply left them where they were before the enactment of Title VII."

The legislative history of the Pregnancy Discrimination Act does not assist appellants. Although the House Report observed that many employers already were subject to state laws prohibiting pregnancy discrimination, H. R. Rep. No. 95–948, pp. 9–11 (1978); see S. Rep. No. 95–331, pp. 10–11 (1977), this observation subsequent to ERISA's enactment conveys no information about the intent of the Congress that passed ERISA. The conferees did not even mention ERISA; evidently, they simply failed to consider whether ERISA plans were subject to state laws prohibiting pregnancy discrimination.

law would be impaired by pre-emption of a state law prohibiting conduct that federal law permitted.

ERISA's structure and legislative history, while not particularly illuminating with respect to § 514(d), caution against applying it too expansively. As we have detailed above, Congress applied the principle of pre-emption "in its broadest sense to foreclose any non-Federal regulation of employee benefit plans," creating only very limited exceptions to pre-emption. 120 Cong. Rec. 29197 (1974) (remarks of Rep. Dent); see *id.*, at 29933 (remarks of Sen. Williams). Sections 4(b)(3) and 514(b), which list specific exceptions, do not refer to state fair employment laws. While § 514(d) may operate to exempt provisions of state laws upon which federal laws depend for their enforcement, the combination of Congress' enactment of an all-inclusive pre-emption provision and its enumeration of narrow, specific exceptions to that provision makes us reluctant to expand § 514(d) into a more general saving clause.

The references to employment discrimination in the legislative history of ERISA provide no basis for an expansive construction of § 514(d). During floor debates, Senator Mondale questioned whether the Senate bill should be amended to require nondiscrimination in ERISA plans. Senator Williams replied that no such amendment was necessary or desirable. He noted that Title VII already prohibited discrimination in benefit plans, and stated: "I believe that the thrust toward centralized administration of nondiscrimination in employment must be maintained. And I believe this can be done by the Equal Employment Opportunity Commission under terms of existing law." 119 Cong. Rec. 30409 (1973). Senator Mondale, "with the understanding that nondiscrimination in pension and profit-sharing plans is fully required under the Equal Employment Opportunity Act," *id.*, at 30410, chose not to offer a nondiscrimination amendment. This colloquy was repeated on the floor of the House by Representatives Abzug and Dent. 120 Cong. Rec. 4726 (1974).

These exchanges demonstrate only the obvious: that § 514(d) does not pre-empt federal law. The speakers referred to federal law, the EEOC, and the need for centralized enforcement. The limited legislative history dealing with § 514(d) is entirely consistent with Congress' goal of ensuring that employers would not face "conflicting or inconsistent State and local regulation of employee benefit plans," 120 Cong. Rec. 29933 (1974) (remarks of Sen. Williams). Congress might well have believed, had it considered the precise issue before us, that ERISA plans should be subject only to the nondiscrimination provisions of Title VII, and not also to state laws prohibiting other forms of discrimination. By establishing benefit plan regulation "as exclusively a federal concern," *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S., at 523, Congress minimized the need for interstate employers to administer their plans differently in each State in which they have employees.[25]

We recognize that our interpretation of § 514(d) as requiring partial pre-emption of state fair employment laws may cause certain practical problems. Courts and state agencies, rather than considering whether employment practices are unlawful under a broad state law, will have to determine whether they are prohibited by Title VII. If they are not, the state law will be superseded and the agency will lack authority to act. It seems more than likely, however, that state agencies and courts are sufficiently familiar with Title VII to apply it in their adjudicative processes. Many States look to Title VII law as a matter of course in defining the scope of their own laws.[26] In any event, these minor practical difficulties do not represent the kind of "impairment" or "modification" of *federal* law that can save a *state* law from pre-emption under § 514(d). To the extent that our construction of ERISA causes any problems in the administration of state fair employment laws, those problems are the result of congressional choice and should be addressed by congressional action. To give § 514(d) the broad construction advocated by appellants would defeat the intent of Congress to provide comprehensive pre-emption of state law.

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[25] An employer with employees in many States might find that the most efficient way to provide benefits to those employees is through a single employee benefit plan. Obligating the employer to satisfy the varied and perhaps conflicting requirements of particular state fair employment laws, as well as the requirements of Title VII, would make administration of a uniform nationwide plan more difficult. The employer might choose to offer a number of plans, each tailored to the laws of particular States; the inefficiency of such a system presumably would be paid for by lowering benefit levels. Alternatively, assuming that the state laws were not in conflict, the employer could comply with the laws of all States in a uniform plan. To offset the additional expenses, the employer presumably would reduce wages or eliminate those benefits not required by any State. Another means by which the employer could retain its uniform nationwide plan would be by eliminating classes of benefits that are subject to state requirements with which the employer is unwilling to comply. ERISA's comprehensive pre-emption of state law was meant to minimize this sort of interference with the administration of employee benefit plans.

B

The Disability Benefits Law presents a different problem. Section 514(a) of ERISA pre-empts state laws that relate to benefit plans "described in section 4(a) and not exempt under section 4(b)." Consequently, while the Disability Benefits Law plainly is a state law relating to employee benefit plans, it is not pre-empted if the plans to which it relates are exempt from ERISA under § 4(b). Section 4(b)(3) exempts "any employee benefit plan . . . maintained solely for the purpose of complying with applicable . . . disability insurance laws." The Disability Benefits Law is a "disability insurance law," of course; the difficulty is that at least some of the benefit plans offered by the Airlines provide benefits not required by that law. The question is whether, with respect to those among the Airlines using multibenefit plans, the Disability Benefits Law's requirement that employers provide particular benefits remains enforceable.

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[26] See, *e. g., Arizona Civil Rights Division* v. *Olson*, 132 Ariz. 20, 24, n. 2, 643 P. 2d 723, 727, n. 2 (1982); *Scarborough* v. *Arnold*, 117 N. H. 803, 807, 379 A. 2d 790, 793 (1977); *Snell* v. *Montana-Dakota Utilities Co.*, 198 Mont. 56, 62, 643 P. 2d 841, 844 (1982); *Orr* v. *Clyburn*, 277 S. C. 536, 539, 290 S. E. 2d 804, 806 (1982); *Albertson's, Inc.* v. *Washington State Human Rights Comm'n*, 14 Wash. App. 697, 699–700, 544 P. 2d 98, 100 (1976).

As the Court of Appeals recognized, § 4(b)(3) excludes "plans," not portions of plans, from ERISA coverage; those portions of the Airlines' multibenefit plans maintained to comply with the Disability Benefits Law, therefore, are not exempt from ERISA and are not subject to state regulation. There is no reason to believe that Congress used the word "plan" in § 4(b) to refer to individual benefits offered by an employee benefit plan. To the contrary, § 4(b)(3)'s use of the word "solely" demonstrates that the purpose of the entire plan must be to comply with an applicable disability insurance law. As the Court noted in *Alessi*, plans that not only provide benefits required by such a law, but also "more broadly serve employee needs as a result of collective bargaining," are not exempt. 451 U. S., at 523, n. 20. The test is not one of the employer's motive—any employer could claim that it provided disability benefits altruistically, to attract good employees, or to increase employee productivity, as well as to obey state law—but whether the plan, as an administrative unit, provides only those benefits required by the applicable state law.

Any other rule, it seems to us, would make little sense. Under the District Court's approach, for which appellants argue here, one portion of a multibenefit plan would be subject only to state regulation, while other portions would be exclusively within the federal domain. An employer with employees in several States would find its plan subject to a different jurisdictional pattern of regulation in each State, depending on what benefits the State mandated under disability, workmen's compensation, and unemployment compensation laws. The administrative impracticality of permitting mutually exclusive pockets of federal and state jurisdiction within a plan is apparent. We see no reason to torture the plain language of § 4(b)(3) to achieve this result. Only separately administered disability plans maintained solely to comply with the Disability Benefits Law are exempt from ERISA coverage under § 4(b)(3).

This is not to say, however, that the Airlines are completely free to circumvent the Disability Benefits Law by adopting plans that combine disability benefits inferior to those required by that law with other types of benefits. Congress surely did not intend, at the same time it preserved the role of state disability laws, to make enforcement of those laws impossible. A State may require an employer to maintain a disability plan complying with state law as a separate administrative unit. Such a plan would be exempt under § 4(b)(3). The fact that state law permits employers to meet their state-law obligations by including disability insurance benefits in a multibenefit ERISA plan, see N. Y. Work. Comp. Law App. § 355.6 (McKinney Supp. 1982–1983), does not make the state law wholly unenforceable as to employers who choose that option.

In other words, while the State may not require an employer to alter its ERISA plan, it may force the employer to choose between providing disability benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan. If the State is not satisfied that the ERISA plan comports with the requirements of its disability insurance law, it may compel the employer to maintain a separate plan that does comply. The Court of Appeals erred, therefore, in holding that appellants are not at all free to enforce the Disability Benefits Law against those appellees that provide disability benefits as part of multibenefit plans.

V

We hold that New York's Human Rights Law is preempted with respect to ERISA benefit plans only insofar as it prohibits practices that are lawful under federal law. To this extent, the judgments of the Court of Appeals are affirmed. To the extent the Court of Appeals held any more of the Human Rights Law pre-empted, we vacate its judgments and remand the cases.

We further hold that the Disability Benefits Law is not pre-empted by ERISA, although New York may not enforce its provisions through regulation of ERISA-covered benefit plans. We therefore vacate the Court of Appeals' judgment in the Airlines' case on this ground and remand that case for further proceedings consistent with this opinion.

No costs are allowed.

It is so ordered.

NEVADA *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81–2245. Argued April 27, 1983—Decided June 24, 1983*

In 1913, the United States sued in Federal District Court, in what is known as the *Orr Ditch* litigation, to adjudicate water rights to the Truckee River for the benefit of both the Pyramid Lake Indian Reservation (Reservation) and the Newlands Reclamation Project (Project). Named as defendants were all water users on the Truckee River in Nevada. Eventually, in 1944, the District Court entered a final decree, pursuant to a settlement agreement, awarding various water rights to the Reservation and the Project, which by this time was now under the management of the Truckee-Carson Irrigation District (TCID). In 1973, the United States filed the present action in the same District Court on behalf of the Reservation, seeking additional rights to the Truckee River, and the Pyramid Lake Paiute Tribe (Tribe) was permitted to intervene in support of the United States. Named as defendants were all persons presently claiming water rights to the Truckee River and its tributaries in Nevada, including the defendants in the *Orr Ditch* litigation and their successors, individual farmers who owned land in the Project, and the TCID. The defendants asserted res judicata as an affirmative defense, claiming that the United States and the Tribe were precluded by the *Orr Ditch* decree from litigating the asserted claim. The District Court sustained the defense and dismissed the complaint. The Court of Appeals affirmed in part and reversed in part, holding that the *Orr Ditch* decree concluded the dispute between, on the one hand, the *Orr Ditch* defendants, their successors in interest, and subsequent appropriators of the Truckee River, and, on the other hand, the United States and the Tribe, but not the dispute between the Tribe and the Project landowners. The court found that since neither the Tribe nor the Project landowners were parties in *Orr Ditch* but instead were represented by the United States, and since their interests may have conflicted in that proceeding, it could not be found that the United States had intended to bind these nonparties *inter se*, absent a specific statement of adversity in the pleadings.

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*Together with No. 81–2276, *Truckee-Carson Irrigation District* v. *United States et al.*; and No. 82–38, *Pyramid Lake Paiute Tribe of Indians* v. *Truckee-Carson Irrigation District et al.*, also on certiorari to the same court.

Held: Res judicata prevents the United States and the Tribe from litigating the instant claim. Pp. 121–145.

(a) Where the Government represented the Project landowners in *Orr Ditch*, the landowners, not the Government, received the beneficial interest in the water rights confirmed to the Government. *Ickes* v. *Fox*, 300 U. S. 82; *Nebraska* v. *Wyoming*, 325 U. S. 589. Therefore, the Government is not at liberty to simply reallocate the water rights decreed to the Reservation and the Project as if it owned those rights. Pp. 121–128.

(b) The cause of action asserted below is the same cause of action that was asserted in the *Orr Ditch* case. The record in that case, including the final decree and amended complaint, clearly shows that the Government was given an opportunity to litigate the Reservation's entire water rights to the Truckee River, and that the Government intended to take advantage of that opportunity. Pp. 130–134.

(c) All of the parties below are bound by the *Orr Ditch* decree. The United States, as a party to the *Orr Ditch* litigation acting as a representative for the interests of the Reservation and the Project, cannot relitigate the Reservation's water rights with those who could use the *Orr Ditch* decree as a defense. The Tribe, whose interests were represented in *Orr Ditch* by the United States, also is bound by the *Orr Ditch* decree as are the *Orr Ditch* defendants and their successors. Moreover, under circumstances where after the *Orr Ditch* litigation was commenced the legal relationships were no longer simply those between the United States and the Tribe, but were also those between the United States, TCID, and the Project landowners, the interests of the Tribe and the Project landowners were sufficiently adverse so that both are now bound by the *Orr Ditch* decree. It need not be determined what the effect of the Government's representation of different interests would be under the law of private trustees and fiduciaries for that law does not apply where Congress has decreed that the Government have dual responsibilities. The Government does not "compromise" its obligation to one interest that Congress obliges it to represent when it simultaneously performs another task for another interest that Congress has obligated it by statute to do. And as to the defendants below who appropriated water from the Truckee River subsequent to the *Orr Ditch* decree, they too, as a necessary exception to the res judicata mutuality requirement, can use that decree against the plaintiffs below. These defendants have relied just as much on that decree in participating in the development of western Nevada as have the parties in the *Orr Ditch* case, and any other conclusion would make it impossible finally to quantify a reserved water right. Pp. 134–144.

649 F. 2d 1286 and 666 F. 2d 351, affirmed in part and reversed in part.

REHNQUIST, J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring opinion, *post*, p. 145.

E. Barrett Prettyman, Special Deputy Attorney General of Nevada, argued the cause for petitioner in No. 81–2245. With him on the briefs were *Brian McKay*, Attorney General, *Richard H. Bryan*, former Attorney General, *Larry D. Struve*, Chief Deputy Attorney General, and *John W. Hoffman* and *Harold A. Swafford*, Special Deputy Attorneys General. *Frederick G. Girard* argued the cause for petitioner in No. 81–2276. With him on the briefs were *James W. Johnson, Jr.*, and *Janet K. Goldsmith*. Messrs. Bryan, Prettyman, Hoffman, Swafford, Johnson, and Girard, and Ms. Goldsmith filed a postargument memorandum for petitioners in Nos. 81–2245 and 81–2276. *Robert S. Pelcyger* argued the cause for petitioner in No. 82–38. With him on the briefs were *Michael R. Thorp*, *Scott B. McElroy*, and *Jeanne S. Whiteing*.

Edwin S. Kneedler argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Dinkins*, *Deputy Solicitor General Claiborne*, *Robert L. Klarquist*, and *Dirk D. Snel*. Messrs. McKay, Prettyman, Hoffman, and Swafford filed a brief for respondent State of Nevada in No. 82–38. *Louis S. Test*, *Steven P. Elliott*, and *Mills Lane* filed a brief for respondents City of Reno et al. in No. 82–38. Messrs. Johnson and Girard and Ms. Goldsmith filed a brief for respondent Truckee–Carson Irrigation District in No. 82–38. Messrs. Pelcyger, Thorp, and McElroy filed a brief for respondent Pyramid Lake Paiute Tribe of Indians in Nos. 81–2245 and 81–2276. *Richard W. Blakey*, *Gordon H. DePaoli*, and *John Madariaga* filed a brief for respondent Sierra Pacific Power Co. in No. 82–38.†

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†Briefs of *amici curiae* urging reversal were filed for the State of New Mexico by *Jeff Bingaman*, Attorney General, and *Peter Thomas White*, Special Assistant Attorney General; and for the State of Alabama et al. by *Charles A. Graddick*, Attorney General of Alabama, *Linley E. Pearson*,

JUSTICE REHNQUIST delivered the opinion of the Court.

In 1913 the United States sued to adjudicate water rights to the Truckee River for the benefit of the Pyramid Lake Indian Reservation and the planned Newlands Reclamation Project. Thirty-one years later, in 1944, the United States District Court for the District of Nevada entered a final decree in the case pursuant to a settlement agreement. In 1973 the United States filed the present action in the same court on behalf of the Pyramid Lake Indian Reservation, seeking additional water rights to the Truckee River. The issue thus presented is whether the Government may partially undo the 1944 decree, or whether principles of res judicata prevent it, and the intervenor Pyramid Lake Paiute Tribe, from litigating this claim on the merits.

Attorney General of Indiana, *William J. Guste, Jr.*, Attorney General of Louisiana, *William A. Allain*, Attorney General of Mississippi, *Paul L. Douglas*, Attorney General of Nebraska, and *Jan Eric Cartwright*, Attorney General of Oklahoma.

Briefs of *amici curiae* urging affirmance were filed for the Sierra Club et al. by *John D. Leshy, Joseph L. Sax*, and *Ralph W. Johnson;* and for the Hoopa Valley Tribe et al. by *Alan C. Stay* and *Steven S. Anderson.*

Briefs of *amici curiae* were filed for the State of Washington et al. by *Kenneth O. Eikenberry*, Attorney General of Washington, *Charles B. Roe, Jr.*, Senior Assistant Attorney General, and *Robert E. Mack*, Assistant Attorney General, *David H. Leroy*, Attorney General of Idaho, and *Phillip J. Rassier* and *Neil L. Tillquist*, Deputy Attorneys General; for the State of Arizona et al. by *Mark V. Meierhenry*, Attorney General of South Dakota, *Mark White*, Attorney General of Texas, *David L. Wilkinson*, Attorney General of Utah, *Steven F. Freudenthal*, Attorney General of Wyoming, *Robert K. Corbin*, Attorney General of Arizona, *George Deukmejian*, Attorney General of California, *Michael T. Greely*, Attorney General of Montana, *Robert O. Wefald*, Attorney General of North Dakota, and *David Frohnmayer*, Attorney General of Oregon; for the Salt River Project Agricultural Improvement and Power District et al. by *Frederick J. Martone;* and for the City of Los Angeles et al. by *R. L. Knox, Jr., Maurice C. Sherrill, Justin McCarthy, Carl Boronkay, Jerome C. Muys, Roberta L. Halladay, Ira Reiner, Gilbert W. Lee, John W. Witt, Joseph Kase, Jr.*, and *Roy H. Mann;* and for Yakima Valley Canal Co. et al. by *Donald H. Bond.*

I

Nevada has, on the average, less precipitation than any other State in the Union. Except for drainage in the southeastern part of the State into the Colorado River, and drainage in the northern part of the State into the Columbia River, the rivers that flow in Nevada generally disappear into "sinks." Department of Agriculture Yearbook, Climate and Man (1941). The present litigation relates to water rights in the Truckee River, one of the three principal rivers flowing through west central Nevada. It rises in the High Sierra in Placer County, Cal., flows into and out of Lake Tahoe, and thence down the eastern slope of the Sierra Nevada mountains. It flows through Reno, Nev., and after a course of some 120 miles debouches into Pyramid Lake, which has no outlet.

It has been said that Pyramid Lake is "widely considered the most beautiful desert lake in North America [and that its] fishery [has] brought it worldwide fame. A species of cutthroat trout . . . grew to world record size in the desert lake and attracted anglers from throughout the world." S. Wheeler, The Desert Lake 90–92 (1967). The first recorded sighting of Pyramid Lake by non-Indians occurred in January 1844 when Captain John C. Frémont and his party camped nearby. In his journal Captain Frémont reported that the lake "broke upon our eyes like the ocean" and was "set like a gem in the mountains." 1 The Expeditions of John Charles Frémont 604–605 (D. Jackson & M. Spence eds. 1970). Commenting upon the fishery, as well as the Pyramid Lake Indians that his party was camping with, Captain Frémont wrote:

> "An Indian brought in a large fish to trade, which we had the inexpressible satisfaction to find was a salmon trout; we gathered round him eagerly. The Indians were amused with our delight, and immediately brought in numbers; so that the camp was soon stocked. Their flavor was excellent—superior, in fact, to that of any fish I

> have ever known. They were of extraordinary size—about as large as the Columbia river salmon—generally from two to four feet in length." *Id.*, at 609.

When first viewed by Captain Frémont in early 1844, Pyramid Lake was some 50 miles long and 12 miles wide. Since that time the surface area of the lake has been reduced by about 20,000 acres.

The origins of the cases before us are found in two historical events involving the Federal Government in this part of the country. First, in 1859 the Department of the Interior set aside nearly half a million acres in what is now western Nevada as a reservation for the area's Paiute Indians. In 1874 President Ulysses S. Grant by Executive Order confirmed the withdrawal as the Pyramid Lake Indian Reservation. The Reservation includes Pyramid Lake, the land surrounding it, the lower reaches of the Truckee River, and the bottom land alongside the lower Truckee.

Then, with the passage of the Reclamation Act of 1902, 32 Stat. 388, the Federal Government was designated to play a more prominent role in the development of the West. That Act directed the Secretary of the Interior to withdraw from public entry arid lands in specified Western States, reclaim the lands through irrigation projects, and then to restore the lands to entry pursuant to the homestead laws and certain conditions imposed by the Act itself. Accordingly, the Secretary withdrew from the public domain approximately 200,000 acres in western Nevada, which ultimately became the Newlands Reclamation Project. The Project was designed to irrigate a substantial area in the vicinity of Fallon, Nev., with waters from both the Truckee and the Carson Rivers.

The Carson River, like the Truckee, rises on the eastern slope of the High Sierra in Alpine County, Cal., and flows north and northeast over a course of about 170 miles, finally disappearing into Carson sink. The Newlands Project accomplished the diversion of water from the Truckee River to the Carson River by constructing the Derby Diversion Dam on the Truckee River, and constructing the Truckee Canal through which the diverted waters would be transported to the Carson River. Experience in the early days of the Project indicated the necessity of a storage reservoir on the Carson River, and accordingly Lahontan Dam was constructed and Lahontan Reservoir behind that dam was created. The combined waters of the Truckee and Carson Rivers impounded in Lahontan Reservoir are distributed for irrigation and related uses on downstream lands by means of lateral canals within the Newlands Reclamation Project.

Before the works contemplated by the Project went into operation, a number of private landowners had established rights to water in the Truckee River under Nevada law. The Government also asserted on behalf of the Indians of the Pyramid Lake Indian Reservation a reserved right under the so-called "implied-reservation-of-water" doctrine set forth in *Winters* v. *United States*, 207 U. S. 564 (1908).[1] The United States therefore filed a complaint in the United States District Court for the District of Nevada in March 1913, commencing what became known as the *Orr Ditch* litigation. The Government, for the benefit of both the Project and the Pyramid Lake Reservation, asserted a claim to 10,000 cubic feet of water per second for the Project and a claim to 500 cubic feet per second for the Reservation. The complaint named as defendants all water users on the Truckee River in Nevada. The Government expressly sought a final decree quieting title to the rights of all parties.

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[1] In *Winters* v. *United States*, this Court construed the agreements creating the Fort Belknap Indian Reservation. While the agreements did not purport to claim any water rights from the Milk River, this Court held that the Federal Government had impliedly reserved a right to the amount of river water necessary to effectuate the purposes of the agreements. Since then we have recognized and applied the *Winters* doctrine in other contexts, see *United States* v. *New Mexico*, 438 U. S. 696, 698 (1978); *Cappaert* v. *United States*, 426 U. S. 128, 138 (1976), including when interpreting an Executive Order that created an Indian reservation, see *Arizona* v. *California*, 373 U. S. 546, 598 (1963).

Following several years of hearings, a Special Master issued a report and proposed decree in July 1924. The report awarded the Reservation an 1859 priority date in the Truckee River for 58.7 second-feet and 12,412 acre-feet annually of water to irrigate 3,130 acres of Reservation lands.[2] The Project was awarded a 1902 priority date for 1,500 cubic feet per second to irrigate, to the extent the amount would allow,[3] 232,800 acres of land within the Project. In February 1926 the District Court entered a temporary restraining order declaring the water rights as proposed by the Special Master. "One of the primary purposes" for entering a temporary order was to allow for an experimental period during which modifications of the declared rights could be made if necessary. App. to Pet. for Cert. in No. 81–2245, p. 186a (hereafter Nevada App.).

Not until almost 10 years later, in the midst of a prolonged drought, was interest stimulated in concluding the *Orr Ditch* litigation. Settlement negotiations were commenced in 1934 by the principal organizational defendants in the case, Washoe County Water Conservation District and the Sierra Pacific Power Co., and the representatives of the

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[2] Congress had passed a provision in 1904 authorizing the Secretary of the Interior to include in the Newlands Reclamation Project lands located in the Pyramid Lake Indian Reservation. Act of Apr. 21, 1904, § 26, 33 Stat. 225. If such lands were included, each individual Indian living on the Reservation was to be allotted five acres of the reclaimed land. The Special Master's report, and the District Court's temporary order, provided additional water rights for the Reservation in the event the allotments were made. Congress abandoned the plan, however, before it was ever implemented. Act of June 18, 1934, § 1, 48 Stat. 984. See 649 F. 2d 1286, 1294 (CA9 1981).

[3] Notwithstanding the Project's 1902 priority, it was awarded far less water than the Government had claimed. While it was recognized that the 1,500 cubic feet per second, together with the water obtained from the Carson River, would not irrigate the Project's entire 232,800 acres, in the subsequent settlement negotiations the Truckee-Carson Irrigation District, then representing the interest of the Project, agreed to this lesser amount. The Court of Appeals noted that "there has never been irrigated more than about 65,000 acres of land in the Project." *Id.*, at 1292, n. 1.

Project and the Reservation. The United States still acted on behalf of the Reservation's interests, but the Project was now under the management of the Truckee-Carson Irrigation District (TCID).[4] The defendants and TCID proposed an agreement along the lines of the temporary restraining order. The United States objected, demanding an increase in the Reservation's water rights to allow for the irrigation of an additional 2,745 acres of Reservation land. After some resistance, the Government's demand was accepted and a settlement agreement was signed on July 1, 1935. The District Court entered a final decree adopting the agreement on September 8, 1944.[5] No appeal was taken. Thus, 31 years after its inception the *Orr Ditch* litigation came to a close.

On December 21, 1973, the Government instituted the action below seeking additional rights to the Truckee River for the Pyramid Lake Indian Reservation; the Pyramid Lake Paiute Tribe was permitted to intervene in support of the United States. The Government named as defendants all persons presently claiming water rights to the Truckee River and its tributaries in Nevada. The defendants include the defendants in the *Orr Ditch* litigation and their successors, approximately 3,800 individual farmers that own land in the Newlands Reclamation Project, and TCID. The District Court certified the Project farmers as a class and directed TCID to represent their interests.[6]

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[4] The newly formed Truckee-Carson Irrigation District had assumed operational control of the Newlands Project pursuant to a contract entered into with the Government on December 18, 1926.

[5] The 9-year gap between the agreement and the final decree was attributable to a provision in the agreement that it would be submitted to the District Court only after completion of the new upstream storage reservoir.

[6] The Government did not name as defendants in its original complaint the Project landowners. Citing the absence of these claimants, the named defendants moved to dismiss for failure to join indispensable parties. Subsequently, the Government moved to amend its complaint so as to join the Project landowners as a class. After a hearing, the motion to amend was granted. App. 193–204.

In its complaint the Government purported not to dispute the rights decreed in the *Orr Ditch* case. Instead, it alleged that *Orr Ditch* determined only the Reservation's right to "water for irrigation," Nevada App. 157a, not the claim now being asserted for "sufficient waters of the Truckee River . . . [for] the maintenance and preservation of Pyramid Lake, [and for] the maintenance of the lower reaches of the Truckee River as a natural spawning ground for fish," *id.*, at 155a–156a. The complaint further averred that in establishing the Reservation the United States had intended that the Pyramid Lake fishery be maintained. Since the additional water now being claimed is allegedly necessary for that purpose, the Government alleged that the Executive Order creating the Reservation must have impliedly reserved a right to this water.[7]

The defendants below asserted res judicata as an affirmative defense, saying that the United States and the Tribe were precluded by the *Orr Ditch* decree from litigating this claim. Following a separate trial on this issue, the District Court sustained the defense and dismissed the complaint in its entirety.

In its decision, the District Court first determined that all of the parties in this action were parties, or in privity with parties, in the *Orr Ditch* case. The District Court then found that the *Orr Ditch* litigation "was intended by all concerned, lawyers, litigants and judges, as a general all inclusive water adjudication suit which sought to adjudicate all rights and claims in and to the waters of the Truckee . . . and required all parties to fully set up their respective water right claims." Nevada App. 185a. The court determined that in accordance with this general intention, the United States had intended in *Orr Ditch* "to assert as large a water right as possible for the Indian reservation." Nevada App. 185a. The District Court further explained:

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[7] Between 1920 and 1940 the surface area of Pyramid Lake was reduced by about 20,000 acres. The decline resulted in a delta forming at the mouth of the Truckee that prevented the fish indigenous to the lake, the Lahontan cutthroat trout and the cui-ui, from reaching their spawning grounds in the Truckee River, resulting in the near extinction of both species. Efforts to restore the fishery have occurred since that time. Pyramid Lake has been stabilized for several years and, augmented by passage of the Washoe Project Act of 1956, § 4, 70 Stat. 777, the lake is being restocked with cutthroat trout and cui-ui. Fish hatcheries operated by both the State of Nevada and the United States have been one source for replenishing the lake. In 1976 the Marble Bluff Dam and Fishway was completed, enabling the fish to bypass the delta to their spawning grounds in the Truckee. Both the District Court and Court of Appeals observed that "these restoration efforts 'appear to justify optimism for eventual success.'" 649 F. 2d, at 1294. See Nevada App. 184a.

> "[T]he cause of action sought to be asserted in this proceeding by the plaintiff and the Tribe is the same quiet title cause of action asserted by the plaintiff in *Orr Ditch* for and on behalf of the Tribe and its members, that is, a *Winters* implied and reserved water right for the benefit of the reservation, with a priority date of December 8, 1859, from a single source of water supply, i. e., the Truckee Watershed. The plaintiff and the Tribe may not litigate several different types of water use claims, all arising under the *Winters* doctrine and all derived from the same water source in a piece-meal fashion. There was but one cause of action in equity to quiet title in plaintiff and the Tribe based upon the *Winters* reserved right theory." *Id.*, at 188a.

The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. 649 F. 2d 1286 (1981), modified, 666 F. 2d 351 (1982). The Court of Appeals agreed that the causes of action asserted in *Orr Ditch* and the instant litigation are the same and that the United States and the Tribe cannot relitigate this cause of action with the *Orr Ditch* defendants or subsequent appropriators of the Truckee River. But the Court of Appeals found that the *Orr Ditch* decree did not conclude the dispute between the Tribe and the owners of Newlands Project lands. The court said that litigants are not to be bound by a prior judgment unless they were adversaries under the earlier pleadings or unless the specific issue in dispute was actually litigated in the earlier case and the court found that neither exception applied here.

The Court of Appeals conceded that "[a] strict adversity requirement does not necessarily fit the realities of water adjudications." 649 F. 2d, at 1309. Nevertheless, the court found that since neither the Tribe nor the Project landowners were parties in *Orr Ditch* but instead were both represented by the United States, and since their interests may have conflicted in that proceeding, the court would not find that the Government had intended to bind these nonparties *inter se* absent a specific statement of adversity in the pleadings. We granted certiorari in the cases challenging the Court of Appeals' decision, 459 U. S. 904 (1982), and we now affirm in part and reverse in part.

II

The Government opens the "Summary of Argument" portion of its brief by stating: "The court of appeals has simply permitted a reallocation of the water decreed in *Orr Ditch* to a single party—the United States—from reclamation uses to a Reservation use with an earlier priority. The doctrine of res judicata does not bar a single party from reallocating its water in this fashion . . . ." Brief for United States 21. We are bound to say that the Government's position, if accepted, would do away with half a century of decided case law relating to the Reclamation Act of 1902 and water rights in the public domain of the West.

It is undisputed that the primary purpose of the Government in bringing the *Orr Ditch* suit in 1913 was to secure water rights for the irrigation of land that would be contained in the Newlands Project, and that the Government was acting under the aegis of the Reclamation Act of 1902 in bringing that action.[8] Section 8 of that Act provides:

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[8] In its amended complaint in *Orr Ditch*, the Government plainly stated that the Newlands Project was initiated pursuant to the Reclamation Act, and that the litigation was designed to quiet title to the Government's right

> "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 32 Stat. 390.

In *California* v. *United States*, 438 U. S. 645 (1978), we described in greater detail the history and structure of the Reclamation Act of 1902, and stated:

> "The projects would be built on federal land and the actual construction and operation of the projects would be in the hands of the Secretary of the Interior. But *the Act clearly provided that state water law would control in the appropriation and later distribution of the water.*" *Id.*, at 664 (emphasis added).

In two leading cases, *Ickes* v. *Fox*, 300 U. S. 82 (1937), and *Nebraska* v. *Wyoming*, 325 U. S. 589 (1945), this Court has

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to the amount of water necessary to irrigate the lands set aside for the Project. Nevada App. 2a–5a. The final decree, entered pursuant to the settlement agreement, gave the United States a specified amount of water "in the Truckee River for the irrigation of 232,800 acres of lands on the Newlands Project, for storage in the Lahontan Reservoir, for generating power, for supplying the inhabitants of cities and towns on the project and for domestic and other purposes . . . ." *Id.*, at 59a.

discussed the beneficial ownership of water rights in irrigation projects built pursuant to the Reclamation Act. In *Ickes* v. *Fox*, the Court said:

> "Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works. Compare *Murphy* v. *Kerr*, 296 Fed. 536, 544, 545. The government was and remained simply a carrier and distributor of the water *(ibid.)*, with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. As security therefor, it was provided that the government should have a lien upon the lands *and the water rights* appurtenent thereto—a provision which in itself imports that the water-rights belong to another than the lienor, that is to say, to the land owner.
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> "The federal government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of 1877 (c. 107, 19 Stat. 377), if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the government title to a parcel of land was not to carry with it a water-right; but all non-navigable waters were reserved for the use of the public under the

> laws of the various arid-land states. *California Power Co.* v. *Beaver Cement Co.*, 295 U. S. 142, 162. And in those states, generally, including the State of Washington, it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by state law and here by express provision of the Reclamation Act as well, part and parcel of the land upon which it is applied." 300 U. S., at 94–96.

In *Nebraska* v. *Wyoming*, the Court stated:

> "The Secretary of the Interior pursuant to § 3 of the Reclamation Act withdrew from public entry certain public lands in Nebraska and Wyoming which were required for the North Platte Project and the Kendrick Project. Initiation of both projects was accompanied by filings made pursuant to § 8 in the name of the Secretary of the Interior for and on behalf of the United States. Those filings were accepted by the state officials as adequate under state law. They established the priority dates for the projects. There were also applications to the States for permits to construct canals and ditches. They described the land to be served. The orders granting the applications fixed the time for completion of the canal, for application of the water to the land, and for proof of appropriation. Individual water users contracted with the United States for the use of project water. These contracts were later assumed by the irrigation districts. Irrigation districts submitted proof of beneficial use to the state authorities on behalf of the project water users. The state authorities accepted that proof and issued decrees and certificates in favor of the individual water users. The certificates named as appropriators the individual landowners. They designated the number of acres included, the use for which

the appropriation was made, the amount of the appropriation, and the priority date. The contracts between the United States and the irrigation districts provided that after the stored water was released from the reservoir it was under the control of the appropriate state officials.

"All of these steps make plain that those projects were designed, constructed and completed according to the pattern of state law as provided in the Reclamation Act. We can say here what was said in *Ickes* v. *Fox*, *supra*, pp. 94–95: 'Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works. Compare *Murphy* v. *Kerr*, 296 Fed. 536, 544, 545. The government was and remained simply a carrier and distributor of the water *(ibid.)*, with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works.'

"The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, *i. e.*, by an actual diversion followed by an application within a reasonable time of the water to a beneficial use. See *Murphy* v. *Kerr*, 296 F. 536, 542, 544, 545; *Commonwealth Power Co.* v. *State Board*, 94 Neb. 613, 143 N. W. 937; *Kersenbrock* v. *Boyes*, 95 Neb. 407, 145

> N. W. 837. Indeed § 8 of the Reclamation Act provides as we have seen that 'the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.'" 325 U. S., at 613–614.

The law of Nevada, in common with most other Western States, requires for the perfection of a water right for agricultural purposes that the water must be beneficially used by actual application on the land. *Prosole* v. *Steamboat Canal Co.*, 37 Nev. 154, 159–161, 140 P. 720, 722 (1914). Such a right is appurtenant to the land on which it is used. *Id.*, at 160–161, 140 P., at 722.

In the light of these cases, we conclude that the Government is completely mistaken if it believes that the water rights confirmed to it by the *Orr Ditch* decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit. Once these lands were acquired by settlers in the Project, the Government's "ownership" of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land. As in *Ickes* v. *Fox* and *Nebraska* v. *Wyoming*, the law of the relevant State and the contracts entered into by the landowners and the United States make this point very clear.[9]

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[9] The contracts entered into between the Project landowners and the United States, or TCID acting pursuant to its agreement with the Government, are similar to those addressed by the Court in *Ickes* v. *Fox* and *Nebraska* v. *Wyoming*. Five different contracts have been used since the creation of the Newlands Project. Two of the forms provide for an exchange of a vested water right by the landowner in return for the right to use Project water. The remaining three provide the landowner a water right in that amount which may be beneficially applied to a specified tract

The Government's brief is replete with references to its fiduciary obligation to the Pyramid Lake Paiute Tribe of Indians, as it properly should be. But the Government seems wholly to ignore in the same brief the obligations that necessarily devolve upon it from having mere title to water rights for the Newlands Project, when the beneficial ownership of these water rights resides elsewhere.

Both the briefs of the parties and the opinion of the Court of Appeals focus their analysis of res judicata on provisions relating to the relationship between private trustees and fiduciaries, especially those governing a breach of duty by the fiduciary to the beneficiary. While these undoubtedly provide useful analogies in cases such as these, they cannot be regarded as finally dispositive of the issues. This Court has long recognized "the distinctive obligation of trust incumbent upon the Government" in its dealings with Indian tribes, see, *e. g.*, *Seminole Nation* v. *United States*, 316 U. S. 286, 296 (1942). These concerns have been traditionally focused on the Bureau of Indian Affairs within the Department of the Interior. *Poafpybitty* v. *Skelly Oil Co.*, 390 U. S. 365, 374 (1968). See 25 U. S. C. § 1.

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of land. App. 197, n. 2. One of these latter types, and the one the District Court found was most commonly used on the Newlands Project, provides in part:

"IN PURSUANCE of the provisions of the act of June 17, 1902 (32 Stat., 388), and acts amendatory thereof or supplementary thereto, especially the act of August 9, 1912 (37 Stat., 265), and the act of August 13, 1914 (38 Stat., 686), all herein styled the reclamation law, and the rules and regulations established under said law, and the terms of that certain Contract between the United States of America and the Truckee-Carson Irrigation District, dated Dec. 18th, 1926, and subject to the conditions named in this instrument, application is hereby made to the TRUCKEE-CARSON IRRIGATION DISTRICT, herein styled District, by the UNDERSIGNED, herein styled Applicant, *for a permanent water right for the irrigation of and to be appurtenant to all of the irrigable area now or hereafter developed under the above-named project within the tract of land described in paragraph 2.*" 4 Record, Doc. No. 92, Exhibit C (emphasis added).

But Congress in its wisdom, when it enacted the Reclamation Act of 1902, required the Secretary of the Interior to assume substantial obligations with respect to the reclamation of arid lands in the western part of the United States. Additionally, in § 26 of the Act of Apr. 21, 1904, 33 Stat. 225, Congress provided for the inclusion of irrigable lands of the Pyramid Lake Indian Reservation within the Newlands Project, and further authorized the Secretary, after allotting five acres of such land to each Indian belonging to the Reservation, to reclaim and dispose of the remainder of the irrigable Reservation land to settlers under the Reclamation Act.

Today, particularly from our vantage point nearly half a century after the enactment of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U. S. C. § 461 *et seq.*, it may well appear that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands. But Congress chose to do this, and it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well. In this regard, the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent. The Government does not "compromise" its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.

With these observations in mind, we turn to the principles of res judicata that we think are involved in this case.

III

Recent cases in which we have discussed principles of estoppel by judgment include *Federated Department Stores,* *Inc.* v. *Moitie*, 452 U. S. 394 (1981); *Allen* v. *McCurry*, 449 U. S. 90 (1980); *Brown* v. *Felsen*, 442 U. S. 127 (1979); *Montana* v. *United States*, 440 U. S. 147 (1979). But what we said with respect to this doctrine more than 80 years ago is still true today; it ensures "the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgments of such tribunals." *Southern Pacific R. Co.* v. *United States*, 168 U. S. 1, 49 (1897).[10]

Simply put, the doctrine of res judicata provides that when a final judgment has been entered on the merits of a case, "[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell* v. *County of Sac*, 94 U. S. 351, 352 (1877). The final "judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever." *Commissioner* v. *Sunnen*, 333 U. S. 591, 597 (1948). See *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 375, 378 (1940).[11]

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[10] The policies advanced by the doctrine of res judicata perhaps are at their zenith in cases concerning real property, land and water. See *Arizona* v. *California*, 460 U. S. 605, 620 (1983); *United States* v. *California & Oregon Land Co.*, 192 U. S. 355, 358–359 (1904); 2 A. Freeman, Law of Judgments § 874, pp. 1848–1849 (5th ed. 1925). As this Court explained over a century ago in *Minnesota Co.* v. *National Co.*, 3 Wall. 332 (1866):

> "Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. . . . [W]here courts vacillate and overrule their own decisions . . . affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change." *Id.*, at 334.

A quiet title action for the adjudication of water rights, such as the *Orr Ditch* suit, is distinctively equipped to serve these policies because "it enables the court of equity to acquire jurisdiction of all the rights involved and also of all the owners of those rights, and thus settle and permanently adjudicate in a single proceeding all the rights, or claims to rights, of all the claimants to the water taken from a common source of supply." 3 C. Kinney, Law of Irrigation and Water Rights § 1535, p. 2764 (2d ed. 1912).

To determine the applicability of res judicata to the facts before us, we must decide first if the "cause of action" which the Government now seeks to assert is the "same cause of action" that was asserted in *Orr Ditch;* we must then decide whether the parties in the instant proceeding are identical to or in privity with the parties in *Orr Ditch*. We address these questions in turn.

A

Definitions of what constitutes the "same cause of action" have not remained static over time. Compare Restatement of Judgments § 61 (1942) with Restatement (Second) of Judgments § 24 (1982).[12] See generally 1B J. Moore, J. Lucas, &

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[11] The corollary preclusion doctrine to res judicata is collateral estoppel. While the latter may be used to bar a broader class of litigants, it can be used only to prevent "relitigation of issues actually litigated" in a prior lawsuit. *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322, 326, n. 5 (1979). While the District Court concluded that the cause of action for reserved water rights asserted in *Orr Ditch* was the same as that asserted in the proceedings below, the District Court found, and the Court of Appeals agreed, that the specific issue of a "water right for fishery purposes" was not actually litigated in *Orr Ditch*. Nevada App. 189a; 649 F. 2d, at 1311. Therefore collateral estoppel was thought to be inapposite. It has been argued that these conclusions were erroneous, but because of our disposition of the cases we need not address this question.

[12] Under the first Restatement of Judgments § 61 (1942), causes of action were to be deemed the same "if the evidence needed to sustain the second action would have sustained the first action." In the Restatement (Sec-

T. Currier, Moore's Federal Practice ¶0.410[1], pp. 348–363 (1983). We find it unnecessary in these cases to parse any minute differences which these differing tests might produce, because whatever standard may be applied the only conclusion allowed by the record in the *Orr Ditch* case is that the Government was given an opportunity to litigate the Reservation's entire water rights to the Truckee, and that the Government intended to take advantage of that opportunity.

In its amended complaint in *Orr Ditch*, the Government averred:

> "Until the several rights of the various claimants, parties hereto, including the United States, to the use of the

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ond) of Judgments (1982), a more pragmatic approach, one "not capable of a mathematically precise definition," was adopted. *Id.*, § 24, Comment *b.* Under this approach causes of actions are the same if they arise from the same "transaction"; whether they are products of the same "transaction" is to be determined by "giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Id.*, § 24.

The Tribe argues that the first Restatement of Judgments standard should control because it was the prevailing standard at the time of *Orr Ditch.* While we find that the result would be the same under either version of the Restatement of Judgments, we nevertheless point out that the Tribe is somewhat mistaken in this argument. Although the "same evidence" standard was "[o]ne of the tests" used at the time, *The Haytian Republic*, 154 U. S. 118, 125 (1894), it was not the only one. For example, in *Baltimore S.S. Co.* v. *Phillips*, 274 U. S. 316 (1927), the Court concluded:

"A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. . . . 'The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. "The *thing*, therefore, which in contemplation of law as its *cause*, becomes a ground for action, is not the group of *facts* alleged in the declaration, bill, or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.*"' *Chobanian* v. *Washburn Wire Company*, 33 R. I. 289, 302." *Id.*, at 321.

> waters flowing in said river and its said tributaries in Nevada or used in Nevada have been settled, and the extent, nature, and order in time of each right to divert said waters from said river and its tributaries has been judicially determined the United States cannot properly protect its rights in and to the said waters, and to protect said rights otherwise than as herein sought if they could be protected would necessitate a multiplicity of suits." Nevada App. 10a.

The final decree in *Orr Ditch* clearly shows that the parties to the settlement agreement and the District Court intended to accomplish this purpose. The decree provided in part:

> "The parties, persons, corporations, intervenors, grantees, successors in interest and substituted parties hereinbefore named, and their and each of their servants, agents, attorneys, assigns and all persons claiming by, through or under them and their successors, in or to the water rights or lands herein mentioned or described, are and *each of them is hereby forever enjoined and restrained from asserting or claiming any rights in or to the waters of the Truckee River or its tributaries, or the waters of any of the creeks or streams or other waters hereinbefore mentioned except the rights, specified, determined and allowed by this decree . . . .*" Nevada App. 145a (emphasis added).

We need not, however, stop here. For evidence more directly showing the Government's intention to assert in *Orr Ditch* the Reservation's full water rights, we return to the amended complaint, where it was alleged:

> "16. On or about or prior to the 29th day of November, 1859, the Government of the United States, having for a long time previous thereto recognized the fact that certain Pah Ute and other Indians were, and they and

> their ancestors had for many years been, residing upon and using certain lands in the northern part of the said Truckee River Valley and around said Pyramid Lake . . . and the said Government being desirous of protecting said Indians and their descendants in their homes, fields, pastures, fishing, and their use of said lands and waters, and in affording to them an opportunity to acquire the art of husbandry and other arts of civilization, and to become civilized, did reserve said lands from any and all forms of entry or sale and for the sole use of said Indians, and for their benefit and civilization. On, to wit, the 23d day of March, 1874, the said lands, having been previously surveyed, were by order of the then President of the United States, for the purposes aforesaid, withdrawn from sale or other disposition, and set apart for the Pah Ute and other Indians aforesaid.
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> . . . . .
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> "The United States by setting aside said lands for said purposes and creating said reservation, and by virtue of the matters and things in this paragraph set forth, did on, to wit, the 29th day of November, 1859, reserve from further appropriation, appropriate and set aside for its own use in, on, and about said Indian reservation, and the land thereof, from and of the waters of the said Truckee River, five hundred (500) cubic feet of water per second of time." Nevada App. 6a–8a.

This cannot be construed as anything less than a claim for the full "implied-reservation-of-water" rights that were due the Pyramid Lake Indian Reservation.

This conclusion is fortified by comparing the *Orr Ditch* complaint with the complaint filed in the proceedings below where, for example, the Government alleged:

> "Members of the Pyramid Lake Paiute Tribe of Indians have lived on the shores of Pyramid Lake from time

> immemorial. . . . They have relied upon water from the Truckee River for irrigation, for domestic uses, for maintenance of the lower segment of the Truckee River as a natural spawning ground for lake fish and for maintenance of the lake as a viable fishery.
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> . . . . .
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> "In establishing the Pyramid Lake Reservation in 1859, there was, by implication, reserved for the benefit of the Pyramid Lake Indians sufficient water from the Truckee River for the maintenance and preservation of Pyramid Lake, for the maintenance of the lower reaches of the Truckee River as a natural spawning ground for fish and the other needs of the inhabitants of the Reservation such as irrigation and domestic use." Nevada App. 153a–154a.

While the Government focuses more specifically on the Tribe's reliance on fishing in this later complaint, it seems quite clear to us that they are asserting the same reserved right for purposes of "fishing" and maintenance of "lands and waters" that was asserted in *Orr Ditch.*[13]

B

Having decided that the cause of action asserted below is the same cause of action asserted in the *Orr Ditch* litigation, we must next determine which of the parties before us are bound by the earlier decree. As stated earlier, the general rule is that a prior judgment will bar the "parties" to the earlier lawsuit, "and those in privity with them," from relitigating the cause of action. *Cromwell* v. *County of Sac*, 94 U. S., at 352.

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[13] The District Court held that neither the United States nor the Tribe can "litigate several different types of water use claims, all arising under the *Winters* doctrine and all derived from the same water source in a piecemeal fashion. There was but one cause of action . . . based upon the *Winters* reserved right theory." Nevada App. 188a. The Court of Appeals observed, however, that the Government could have sought, even though it did not, an adjudication of a reserved right for certain purposes, such as irrigation, leaving open the possibility of expanding the Reservation's water rights for other purposes, such as the fishery. 649 F. 2d, at 1302. We need not resolve this dispute because we agree with the Court of Appeals that in *Orr Ditch* the Government made no effort to split its *Winters* cause of action.

There is no doubt but that the United States was a party to the *Orr Ditch* proceeding, acting as a representative for the Reservation's interests and the interests of the Newlands Project, and cannot relitigate the Reservation's "implied-reservation-of-water" rights with those who can use the *Orr Ditch* decree as a defense. See *United States* v. *Title Insurance & Trust Co.*, 265 U. S. 472, 482–486 (1924). We also hold that the Tribe, whose interests were represented in *Orr Ditch* by the United States, can be bound by the *Orr Ditch* decree.[14] This Court left little room for an argument to the contrary in *Heckman* v. *United States*, 224 U. S. 413 (1912), where it plainly said that "it could not, consistently with any principle, be tolerated that, after the United States on behalf of its wards had invoked the jurisdiction of its courts . . . these wards should themselves be permitted to relitigate the question." *Id.*, at 446. See also Restatement (Second) of Judgments § 41(1)(d) (1982). We reaffirm that principle now.[15]

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[14] We, of course, do not pass judgment on the quality of representation that the Tribe received. In 1951 the Tribe sued the Government before the Indian Claims Commission for damages, basing its claim of liability on the Tribe's receipt of less water for the fishery than it was entitled to. *Northern Paiute Tribe* v. *United States*, 30 Ind. Cl. Comm'n 210 (1973). In a settlement the Tribe was given $8 million in return for its waiver of further liability on the part of the United States.

[15] This Court held in *Hansberry* v. *Lee*, 311 U. S. 32, 44 (1940), that persons vicariously represented in a class action could not be bound by a judgment in the case where the representative parties had interests that impermissibly conflicted with those of persons represented. See also Restatement (Second) of Judgments § 42(1)(d) (1982). The Tribe seeks to

We then turn to the issue of which defendants in the present litigation can use the *Orr Ditch* decree against the Government and the Tribe. There is no dispute but that the *Orr Ditch* defendants were parties to the earlier decree and

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take advantage of this ruling, arguing that the Government's primary interest in *Orr Ditch* was to obtain water rights for the Newlands Reclamation Project and that by definition any water rights given to the Tribe would conflict with that interest. We reject this contention.

We have already said that the Government stands in a different position than a private fiduciary where Congress has decreed that the Government must represent more than one interest. When the Government performs such duties it does not by that reason alone compromise its obligation to any of the interests involved.

The Justice Department's involvement in *Orr Ditch* began with a letter from the Secretary of the Interior to the Attorney General requesting that a single suit be brought by the Government for a determination "of all water rights in Lake Tahoe and Truckee River above the intake of the Truckee-Carson Reclamation project." App. 263. A Special Assistant United States Attorney assigned to the matter was apparently the first to recognize that the Government should in the same suit seek to establish the water rights to the Pyramid Lake Indian Reservation. In a memorandum where the Special Assistant explained the reserved-water-rights holding of *Winters*, he advanced the view that "[t]hese Indian reservation water rights are important and should be established to the fullest extent because they are senior and superior to most if not all the other rights on the river." App. 269–270.

Contemporaneously with this report, the Acting Director of the Reclamation Service notified the Commissioner of Indian Affairs that an assertion of the Reservation's rights should be included in *Orr Ditch*. The claim was advanced accordingly and thereafter the Bureau of Indian Affairs was kept aware of the *Orr Ditch* proceedings; during the settlement negotiations the BIA directly participated. The BIA is the agency of the Federal Government "charged with fulfilling the trust obligations of the United States" to Indians, *Poafpybitty* v. *Skelly Oil Co.*, 390 U. S. 365, 374 (1968), and there is nothing in the record of this case to indicate that any official outside of the BIA attempted to influence the BIA's decisions in a manner inconsistent with these obligations.

The record suggests that the BIA alone may have made the decision not to press claims for a fishery water right, for reasons which hindsight may render questionable, but which did not involve other interests represented that they and their successors can rely on the decree. The Court of Appeals so held, and we affirm.

The Court of Appeals reached a different conclusion concerning TCID and the Project farmers that it now represents. The Court of Appeals conceded that the Project's in-

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by the Government. For instance, in a 1926 letter to a federal official on the Pyramid Lake Reservation, the Commissioner of Indian Affairs explained:

"We feel that the Indians would be wise to assume that Truckee River water will be used practically as far as it can be for irrigation, and that the thing for the Indians to do is, if possible, instead of trying to stop such development to direct it so that it will inure to their benefit.

. . . . .

". . . [I]f their ultimate welfare depends in part on their being able to hold their own in a civilized world . . . they should look forward to a different means of livelihood, in part at least, from their ancestral one, of fishing and hunting. They should expect not only to farm their allotments but also to do other sorts of work and have other ways of making a living." App. 435–436.

Furthermore, the District Court found that during the pendency of the *Orr Ditch* proceedings "a serious and reasonable doubt existed as to whether any *Winters* reserved water right could be claimed at all for an executive order Indian reservation." Nevada App. 185a.

In pressing for a different conclusion, the Tribe relies primarily on a finding by the District Court that it was the intention of the Government in *Orr Ditch* "to assert as large a water right as possible for the Indian reservation, and to do everything possible to protect the fish for the benefit of the Indians and the white population insofar as it was 'consistent with the larger interests involved in the propositions having to do with the reclamation of thousands of acres of arid and now useless land for the benefit of the country as a whole.'" Nevada App. 185a. The Tribe's focus on this ambiguous finding, however, has not blinded us to the District Court's specific finding on the alleged conflict.

"[T]here was a foreseeable conflict of purposes created by the Congress within the Interior Department and as between the Bureau of Reclamation on the one hand in asserting large water rights for its reclamation projects and the Bureau of Indian Affairs on the other in the performance of its obligations to protect the rights and interests of the Indians on the Pyramid terests, like the Reservation's interests, were represented in *Orr Ditch* by the United States and thus that TCID, like the Tribe, stands with respect to that litigation in privity with the United States. The court further stated, however, that "[a]s a general matter, a judgment does not conclude parties who were not adversaries under the pleadings," and that in "representative litigation we should be especially careful not to infer adversity between interests represented by a single litigant." 649 F. 2d, at 1309. Since the pleadings in *Orr Ditch* did not specifically allege adversity between the claims asserted on behalf of the Newlands Project and those asserted on behalf of the Reservation, the Court of Appeals ruled that the decree did not conclude the dispute between them.

At the commencement of the *Orr Ditch* litigation, the United States sought water rights both for the Pyramid Lake Indian Reservation and for the irrigation of lands in the Newlands Project. It was obviously not "adverse" to itself in seeking these two separate allocations of water rights, and even if we were to treat the Paiute Tribe and the beneficial

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Lake Paiute Indian Reservation. [T]his conflict of purposes was apparent prior to and during the *Orr Ditch* proceedings and was resolved within the executive department of government by top-level executive officers acting within the scope of their Congressionally-delegated duties and authority and were political and policy decisions of those officials charged with that responsibility, which decisions resulted in the extinguishment of the alleged fishery purposes water right. . . . The government lawyers in *Orr Ditch*, both departmental, agency and bureaus, as well as those charged with the responsibility for the actual conduct of the litigation, are not chargeable with an impermissible conflict of purpose or interest in carrying out the decisions and directions of their superiors in the executive department of government . . . ." *Id.*, at 189a–190a.

The District Court's finding reflects the nature of a democratic government that is charged with more than one responsibility; it does not describe conduct that would deprive the United States of the authority to conduct litigation on behalf of diverse interests.

owners of water rights within the Project as being in privity with the Government, it might be that in a different kind of litigation the res judicata consequences would be different. But as the Court of Appeals noted:

> "A strict adversity requirement does not necessarily fit the realities of water adjudications. All parties' water rights are interdependent. See *Frost* v. *Alturas*, 11 Idaho 294, 81 P. 996, 998 (1905); Kinney, *Irrigation and Water Rights* at 277. Stability in water rights therefore requires that all parties be bound in all combinations. Further, in many water adjudications there is no actual controversy between the parties; the proceedings may serve primarily an administrative purpose." 649 F. 2d, at 1309.

We agree with these observations of the Court of Appeals. That court felt, however, that these factors did not control these cases because the "Tribe and the Project were neither parties nor co-parties, however. They were non-parties who were represented simultaneously by the same government attorneys." *Ibid.* We disagree with the Court of Appeals as to the consequence of this fact.

It has been held that the successors in interest of parties who are not adversaries in a stream adjudication nevertheless are bound by a decree establishing priority of rights in the stream. See, *e. g.*, *Morgan* v. *Udy*, 58 Idaho 670, 79 P. 2d 295 (1938). In that case the Idaho court said:

> "'[I]n the settlement of cases of this character every user of water on the stream and all of its tributaries in litigation are interested in the final award to *each claimant* . . . . *Every claimant of the water* of either stream, it matters not whether it be at the upper or lower end of either, or after the junction of the two, *is interested in a final adjudication of all* the claimants of all the waters that flow to the claimants at the lower end of the stream

> after its junction. In other words, . . . it matters but little who are plaintiffs and who are defendants in the settlement of cases of this character; the real issue being who is first in right to the use of the waters in dispute.'" *Id.*, at 681, 79 P. 2d, at 299.

This rule seems to be generally applied in stream adjudications in the Western States, where these actions play a critical role in determining the allocation of scarce water rights, and where each water rights claim by its "very nature raise[s] issues inter se as to all such parties for the determination of one claim necessarily affects the amount available for the other claims. *Marlett* v. *Prosser*, 1919, 66 Colo. 91, 179 P. 141, 142." *City of Pasadena* v. *City of Alhambra*, 180 P. 2d 699, 715 (Cal. App. 1947). See *Pacific Live Stock Co.* v. *Ellison Ranching Co.*, 52 Nev. 279, 296–297, 286 P. 120, 123 (1930); *In re Chewaucan River*, 89 Ore. 659, 666, 171 P. 402, 403–404 (1918). See also 6 Waters and Water Rights § 513.2, p. 304 (R. Clark ed. 1972 and Supp. 1978).

In these cases, as we have noted, the Government as a single entity brought the action seeking a determination both of the Tribe's reserved rights and of the water rights necessary for the irrigation of land within the Newlands Project. But it separately pleaded the interests of both the Project and the Reservation. During the settlement negotiations the interests of the Project, and presumably of the landowners to whom the water rights actually accrued, were represented by the newly formed TCID and the interests of the Reservation were represented by the Bureau of Indian Affairs. The settlement agreement was signed by the Government and by TCID. It would seem that at this stage of the litigation the interests of the Tribe and TCID were sufficiently adverse for the latter to oppose the Bureau's claim for additional water rights for the Reservation during the settlement negotiations.

The Court of Appeals held, however, that "in representative litigation we should be especially careful not to infer adversity between interests represented by a single litigant," 649 F. 2d, at 1309, analogizing the Government's position to that of a trustee under the traditional law of trusts. But as we have indicated previously, we do not believe that this analogy from the world of private law may be bodily transposed to the present situation.

The Court of Appeals went on to conclude: "By representing the Tribe and the Project against the *Orr Ditch* defendants, the government compromised its duty of undivided loyalty to the Tribe. See Restatement (Second) of Trusts, *supra*, § 170, & Comments p, q, r." *Id.*, at 1310. This section of the Restatement (Second) of Trusts (1959) is entitled "Duty of Loyalty," and states that "(1) the trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary." Comments *p*, *q*, and *r* deal respectively with "[c]ompetition with the beneficiary," "[a]ction in the interest of a third person," and "[d]uty of trustee under separate trusts."

As we previously intimated, we think the Court of Appeals' reasoning here runs aground because the Government is simply not in the position of a private litigant or a private party under traditional rules of common law or statute. Our cases make this plain in numerous areas of the law. See *United States* v. *ICC*, 337 U. S. 426, 431–432 (1949); *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409 (1917). In the latter case, the Court said:

> "As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. . . . A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it." *Ibid.*

And in the very area of the law with which we deal in these cases, this Court said in *Heckman* v. *United States*, 224 U. S., at 444–445:

> "There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents—whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend on the Indian's acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty."

These cases, we believe, point the way to the correct resolution of the instant cases. The United States undoubtedly owes a strong fiduciary duty to its Indian wards. See *Seminole Nation* v. *United States*, 316 U. S., at 296–297; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 497–498 (1937). It may be that where only a relationship between the Government and the tribe is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects adequately describe the duty of the United States. But where Congress has imposed upon the United States, in addition to its duty to represent Indian tribes, a duty to obtain water rights for reclamation projects, and has even authorized the inclusion of reservation lands within a project, the analogy of a faithless private fiduciary cannot be controlling for purposes of evaluating the authority of the United States to represent different interests.

At least by 1926, when TCID came into being, and very likely long before, when conveyances of the public domain to settlers within the Reclamation Project necessarily carried with them the beneficial right to appropriate water reserved to the Government for this purpose, third parties entered into the picture. The legal relationships were no longer simply those between the United States and the Paiute Tribe, but also those between the United States, TCID, and the several thousand settlers within the Project who put the Project water to beneficial use. We find it unnecessary to decide whether there would be adversity of interests between the Tribe, on the one hand, and the settlers and TCID, on the other, if the issue were to be governed by private law respecting trusts. We hold that under the circumstances described above, the interests of the Tribe and the Project landowners were sufficiently adverse so that both are now bound by the final decree entered in the *Orr Ditch* suit.

We turn finally to those defendants below who appropriated water from the Truckee subsequent to the *Orr Ditch* decree. These defendants, we believe, give rise to a difficult question, but in the final analysis we agree with the Court of Appeals that they too can use the *Orr Ditch* decree against the plaintiffs below. While mutuality has been for the most part abandoned in cases involving collateral estoppel, see *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313 (1971), it has remained a part of the doctrine of res judicata. Nevertheless, exceptions to the res judicata mutuality requirement have been found necessary, see 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4464, pp. 586–588 (1981 and Supp. 1982), and we believe that such an exception is required in these cases.

Orr Ditch was an equitable action to quiet title, an *in personam* action. But as the Court of Appeals determined, it "was no garden variety quiet title action." 649 F. 2d, at 1308. As we have already explained, everyone involved in *Orr Ditch* contemplated a comprehensive adjudication of water rights intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to. Thus, even though quiet title actions are *in* *personam* actions, water adjudications are more in the nature of *in rem* proceedings. Nonparties such as the subsequent appropriators in these cases have relied just as much on the *Orr Ditch* decree in participating in the development of western Nevada as have the parties of that case. We agree with the Court of Appeals that under "these circumstances it would be manifestly unjust . . . not to permit subsequent appropriators" to hold the Reservation to the claims it made in *Orr Ditch;* "[a]ny other conclusion would make it impossible ever finally to quantify a reserved water right." 649 F. 2d, at 1309.[16]

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[16] The Tribe makes the argument that even if res judicata would otherwise apply, it cannot be used in these cases because to do so would deny the Tribe procedural due process. The Tribe argues that in *Orr Ditch* they were given neither the notice required by *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950), nor the full and fair opportunity to be heard required by *Hansberry* v. *Lee*, 311 U. S. 32 (1940), and *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422 (1982). *Mullane,* which involved a final accounting between a trustee and beneficiaries, is of course inapposite. *Hansberry* was based upon an impermissible conflict in a class action between the representatives of the class and certain class members; we have already said that such a conflict did not exist in these cases and that in any event this litigation is governed by different rules than those that apply in private representative litigation. *Logan* did not involve a fiduciary relationship, and like *Mullane,* was a suit where the complaining party would be left without recourse. In these cases, the Tribe, through the Government as their representative, was given adequate notice and a full and fair opportunity to be heard. If in carrying out its role as representative, the Government violated its obligations to the Tribe, then the Tribe's remedy is against the Government, not against third parties. As we have noted earlier, the Tribe has already taken advantage of that remedy.

Finally, TCID challenges the Court of Appeals' conclusion that the Secretary of the Interior is not authorized to negotiate and execute an out-of-court settlement of disputed Indian water rights, and therefore that the *Orr Ditch* settlement agreement did not provide an independent bar to the Tribe's attempt to relitigate the *Orr Ditch* cause of action. Brief for Petitioner in No. 81-2276, pp. 42-48. Because of our disposition of the cases, we need not address this issue.

IV

In conclusion we affirm the Court of Appeals' finding that the cause of action asserted below and the cause of action asserted in *Orr Ditch* are one and the same. We also affirm the Court of Appeals' finding that the *Orr Ditch* decree concluded the controversy on this cause of action between, on the one hand, the *Orr Ditch* defendants, their successors in interest, and subsequent appropriators of the Truckee River, and, on the other hand, the United States and the Tribe. We reverse the Court of Appeals, however, with respect to its finding concerning TCID, and the Project farmers it represents, and hold instead that the *Orr Ditch* decree also ended the dispute raised between these parties and the plaintiffs below.

It is so ordered.

JUSTICE BRENNAN, concurring.

The mere existence of a formal "conflict of interest" does not deprive the United States of authority to represent Indians in litigation, and therefore to bind them as well. If, however, the United States actually causes harm through a breach of its trust obligations the Indians should have a remedy against it. I join the Court's opinion on the understanding that it reaffirms that the Pyramid Lake Paiute Tribe has a remedy against the United States for the breach of duty that the United States has admitted. See *ante*, at 144, n. 16.

In the final analysis, our decision today is that thousands of small farmers in northwestern Nevada can rely on specific promises made to their forebears two and three generations ago, and solemnized in a judicial decree, despite strong claims on the part of the Pyramid Lake Paiutes. The availability of water determines the character of life and culture in this region. Here, as elsewhere in the West, it is insufficient to satisfy all claims. In the face of such fundamental natural limitations, the rule of law cannot avert large measures of loss, destruction, and profound disappointment, no matter how scrupulously evenhanded are the law's doctrines and administration. Yet the law can and should fix responsibility for loss and destruction that should have been avoided, and it can and should require that those whose rights are appropriated for the benefit of others receive appropriate compensation.*

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*I also note that the District Court found that one of the purposes for establishment of the Pyramid Lake Reservation was "to provide the Indians with access to Pyramid Lake . . . in order that they might obtain their sustenance, at least in part, from these historic fisheries." App. to Pet. for Cert. in No. 81–2245, p. 183a. As a consequence, the Tribe retains a *Winters* right, at least in theory, to water to maintain the fishery, a right which today's ruling does not question. To some extent it may be possible to satisfy the Tribe's claims consistent with the *Orr Ditch* decree—for instance, through judicious management of the Derby Dam and Lahontan Reservoir, improvement of the quality of the Newlands Project irrigation works, application of heretofore unappropriated floodwaters, or invocation of the decree's provisions for restricting diversions in excess of those allowed by the decree.

EDWARD J. DEBARTOLO CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-1985. Argued March 22, 1983—Decided June 24, 1983

Section 8(b)(4) of the National Labor Relations Act prohibits secondary boycotts, but its so-called "publicity proviso" exempts from the prohibition publicity advising the public that a product is produced by an employer with whom a union has a primary dispute and is distributed by another employer. As a result of a wage dispute between respondent union and a building contractor retained by a company to construct a department store in a shopping center owned and operated by petitioner, the union passed out handbills to consumers in the shopping center urging them not to patronize any of the stores in the center until petitioner publicly promised that all construction at the center would be done by contractors who pay their employees fair wages and fringe benefits. Petitioner filed an unfair labor practice charge with the National Labor Relations Board, which held that the handbilling was exempted from the secondary boycott prohibition of § 8(b)(4) by the "publicity proviso" and dismissed the complaint. The Board reasoned that there was a "symbiotic" relationship between petitioner and its tenants, including the department store company, and that they would derive a substantial benefit from the "product" that the building contractor was constructing, namely, the new store, the contractor's status as a producer bringing a total consumer boycott of the shopping center within the "publicity proviso." The Court of Appeals agreed, holding that the building contractor was a producer and that petitioner and its tenants were distributors within the meaning of the proviso.

Held: The handbilling does not come within the protection of the "publicity proviso." Pp. 153-157.

(a) The only publicity exempted from the secondary boycott prohibition is publicity intended to inform the public that the primary employer's product is "distributed by" the secondary employer. Here, the Board's analysis would almost strip the distribution requirement of any limiting effect and diverts the inquiry away from the relationship between the primary and secondary employers and toward the relationship between the two secondary employers. It then tests that relationship by a standard so generous that it would be satisfied by virtually any secondary employer that a union might want consumers to boycott. Pp. 155–156.

(b) The handbills at issue did not merely call for a boycott of the department store company's products; they also called for a boycott of the products being sold by the company's cotenants. Neither petitioner nor any of the cotenants had any business relationship with the building contractor nor do they sell any product whose chain of production can reasonably be said to include the contractor. Hence, there is no justification for treating the products that the cotenants distribute to the public as products produced by the contractor. Pp. 156–157.

662 F. 2d 264, vacated and remanded.

Stevens, J., delivered the opinion for a unanimous Court.

Lawrence M. Cohen argued the cause for petitioner. With him on the briefs were *W. Reynolds Allen* and *Mark E. Levitt.*

Norton J. Come argued the cause for respondents. With him on the brief for respondent National Labor Relations Board were *Solicitor General Lee, Linda Sher,* and *Elinor Hadley Stillman. Richard H. Frank, Laurence J. Cohen, Laurence Gold,* and *George Kaufmann* filed a brief for respondent Florida Gulf Coast Building Trades Council, AFL–CIO.*

JUSTICE STEVENS delivered the opinion of the court.

As a result of a labor dispute between respondent union and the H. J. High Construction Company (High), the union passed out handbills urging consumers not to trade with a group of employers who had no business relationship of any kind with High. The question presented is whether that handbilling is exempted from the prohibition against second-

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*Briefs of *amici curiae* urging reversal were filed by *Stephen A. Bokat* for the Chamber of Commerce of the United States; by *Harry L. Browne* for the American Retail Federation; by *G. Brockwel Heylin* for the Associated General Contractors of America, Inc.; and by *Edward J. Sack* for the International Council of Shopping Centers, Inc.

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ary boycotts contained in § 8(b)(4)[1] of the National Labor Relations Act, as amended, 29 U. S. C. § 158(b)(4), by what is known as the "publicity proviso" to that section.[2]

High is a general building contractor retained by the H. J. Wilson Company (Wilson) to construct a department store in a shopping center in Tampa, Fla. Petitioner, the Edward J. DeBartolo Corporation (DeBartolo), owns and operates the center. Most of the 85 tenants in the mall signed a standard lease with DeBartolo providing for a minimum rent (which increases whenever a large new department store opens for business) plus a percentage of gross sales, and requiring the tenant to pay a proportionate share of the costs of maintaining the mall's common areas, to pay dues to a merchants' association, and to take part in four joint advertising brochures. Wilson signed a slightly different land lease agreement, but it also promised to pay dues to the merchants' association and to share in the costs of maintaining the common areas. Under the terms of Wilson's lease, neither DeBartolo nor any of the other tenants had any right to control the manner in which High discharged its contractual obligation to Wilson.

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[1] That section makes it an unfair labor practice for a labor organization or its agents

"(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person . . . ." 61 Stat. 140, as amended, 29 U. S. C. § 158(b)(4).

[2] That proviso reads as follows:

"*Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution." 73 Stat. 543, 29 U. S. C. § 158(b)(4).

The union conducted its handbilling at all four entrances to the shopping center for about three weeks, while the new Wilson store was under construction. Without identifying High by name, the handbill stated that the contractors building Wilson's Department Store were paying substandard wages, and asked the readers not to patronize any of the stores in the mall until DeBartolo publicly promised that all construction at the mall would be done by contractors who pay their employees fair wages and fringe benefits.[3] The handbilling was conducted in an orderly manner, and was not accompanied by any picketing or patrolling. DeBartolo advised the union that it would not oppose this handbilling if the union modified its message to make clear that the dispute did not involve DeBartolo or any of Wilson's cotenants, and if it limited its activities to the immediate vicinity of Wilson's. When the union persisted in distributing handbills to all patrons of the shopping center, DeBartolo filed a trespass action in the state court and an unfair labor practice charge with the National Labor Relations Board. The Board's General Counsel issued a complaint.

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[3] The handbills read:

"PLEASE *DON'T SHOP AT EAST LAKE SQUARE MALL* PLEASE

"The FLA. GULF COAST BUILDING TRADES COUNCIL, AFL–CIO is requesting that you do not shop at the stores in the East Lake Square Mall because of The Mall ownership's contribution to substandard wages.

"The Wilson's Department Store under construction on these premises is being built by contractors who pay substandard wages and fringe benefits. In the past, the Mall's owner, The Edward J. DeBartolo Corporation, has supported labor and our local economy by insuring that the Mall and its stores be built by contractors who pay fair wages and fringe benefits. Now, however, and for no apparent reason, the Mall owners have taken a giant step backwards by permitting our standards to be torn down. The payment of substandard wages not only diminishes the working person's ability to purchase with earned, rather than borrowed, dollars, but it also undercuts the wage standard of the entire community. Since low construction wages at this time of inflation means decreased purchasing power, do the owners of East Lake Mall intend to compensate for the decreased purchasing power of workers of the community by encouraging the stores in East Lake Mall to cut their prices and lower their profits?

"CUT-RATE WAGES ARE NOT FAIR UNLESS MERCHANDISE PRICES ARE ALSO CUT-RATE.

"We ask for your support in our protest against substandard wages. Please do not patronize the stores in the East Lake Square Mall until the Mall's owner publicly promises that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits.

The complaint recited the dispute between the union and High, and noted the absence of any labor dispute between the union and DeBartolo, Wilson, or any of the other tenants of the East Lake Mall. The complaint then alleged that in furtherance of its primary dispute with High, the union "has threatened, coerced or restrained, and is threatening, coercing or restraining, various tenant Employers who are engaged in business at East Lake Square Mall, and who lease space from DeBartolo in East Lake Square Mall, by handbilling the general public not to do business with the above-described tenant Employers . . . ." Complaint ¶ 8(a). The complaint alleged that the object of the handbilling "was and is, to force or require the aforesaid tenant Employers in East Lake Square Mall . . . to cease using, handling, transporting, or otherwise dealing in products and/or services of, and to cease doing business with DeBartolo, in order to force DeBartolo and/or Wilson's not to do business with High." Complaint ¶ 8(b).

After the union filed its answer, the parties stipulated to the relevant facts and submitted the matter to the Board for

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"IF YOU MUST ENTER THE MALL TO DO BUSINESS, please express to the store managers your concern over substandard wages and your support of our efforts.

"We are appealing only to the public—the consumer. We are not seeking to induce any person to cease work or to refuse to make deliveries."

decision. Without deciding whether the handbilling constituted a form of "coercion" or "restraint" proscribed by § 8(b)(4), the Board concluded that it was exempted from the Act by the "publicity proviso" and dismissed the complaint. *Florida Gulf Coast Building Trades Council, AFL–CIO (Edward J. DeBartolo Corp.)*, 252 N. L. R. B. 702 (1980). The Board reasoned that there was a "symbiotic" relationship between DeBartolo and its tenants, including Wilson, and that they all would derive a substantial benefit from the "product" that High was constructing, namely Wilson's new store. The Board did not expressly state that DeBartolo and the other tenants could be said to be distributors of that product, but concluded that High's status as a producer brought a total consumer boycott of the shopping center within the publicity proviso.[4]

The Court of Appeals agreed. 662 F. 2d 264 (CA4 1981). It observed that our decision in *NLRB* v. *Servette, Inc.*, 377 U. S. 46 (1964), had rejected a narrow reading of the proviso and that the Board had consistently construed it in an expansive manner. Finding the Board's interpretation consistent with the rationale of the National Labor Relations Act, it held that High was a producer and that DeBartolo and the other tenants were distributors within the meaning of the proviso. This holding reflected the court's belief that in response to the union's consumer handbilling, DeBartolo and the storekeepers would be able "in turn, to apply pressure on Wilson's and High." 662 F. 2d, at 271. Because the decision conflicts with that of the Court of Appeals for the Eighth Circuit in *Pet, Inc.* v. *NLRB*, 641 F. 2d 545 (1981), we granted certiorari. 459 U. S. 904 (1982).[5]

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[4] The Board concluded:

"In sum, we find that the mutual obligations between the parties and the benefits derived from participation in the mall enterprise reflect the symbiotic nature of the relationship between DeBartolo and its tenants, not unlike the relationship between the operations of a diversified corporation. High's contribution to this enterprise is as an employer which applies its labor to a product, i. e., the Wilson's store, from which DeBartolo and its tenants will derive substantial benefit. Consequently, we find as a result of its relationship with Wilson's and the shopping center enterprise that High applies capital, enterprise, and service to that enterprise, and thus that it is a 'producer' in the sense that that term is used in the publicity proviso as interpreted by the Supreme Court in *Servette*, [377 U. S. 46 (1964)], and by this Board in *Pet*, [244 N. L. R. B. 96 (1979)].

"Having found High to be a producer within the meaning of Section 8(b)(4), we find that Respondent's handbilling urging a total consumer boycott of DeBartolo and its tenants other than Wilson's is protected by the publicity proviso of that section of the Act." 252 N. L. R. B., at 705.

The Board and the union correctly point out that DeBartolo cannot obtain relief in this proceeding unless it prevails on three separate issues. It must prove that the union did "threaten, coerce, or restrain" a person engaged in commerce, with the object of "forcing or requiring" someone to cease doing business with someone else—that is to say, it must prove a violation of § 8(b)(4)(ii)(B). It must also overcome both the union's defense based on the publicity proviso and the union's claim that its conduct was protected by the First Amendment. Neither the Board nor the Court of Appeals considered whether the handbilling in this case was covered by § 8(b)(4)(ii)(B) or protected by the First Amendment, because both found that it fell within the proviso. We therefore limit our attention to that issue.

The publicity proviso applies to communications "other than picketing," that are "truthful," and that do not produce either an interference with deliveries or a work stoppage by employees of any person other than the firm engaged in the primary labor dispute. The Board and the Court of Appeals found that these three conditions were met, and these findings are not now challenged. The only question is whether the handbilling "advis[ed] the public . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer." The parties agree that this language limits the proviso's protection to publicity that is designed to create consumer pressure on secondary employers who distribute the primary employer's products. They do not agree, however, on what constitutes a producer-distributor relationship.

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[5] DeBartolo was successful in its trespass action in the state court. The handbilling at the East Lake Mall was enjoined and ceased on January 4, 1980. The parties agree, however, that the case is not moot. DeBartolo operates a number of shopping centers at various locations throughout the United States, and the union maintains that it has a right to engage in comparable handbilling in the future if a similar problem should again arise. That possibility, together with the fact that a cease-and-desist order would protect DeBartolo from a recurrence in the future, provides a sufficient basis for concluding that the case is not moot.

We have analyzed the producer-distributor requirement in only one case, *NLRB* v. *Servette, Inc., supra. Servette* involved a primary dispute between a union and a wholesale distributor of candy and certain other specialty items sold to the public by supermarkets. The union passed out handbills in front of some of the chainstores urging consumers not to buy any products purchased by the store from Servette. We held that even though Servette did not actually manufacture the items that it distributed, it should still be regarded as a "producer" within the meaning of the proviso. We thus concluded that the handbills advised the public that the products were produced by an employer with whom the union had a primary dispute (Servette) and were being distributed by another employer (the supermarket).

In reaching that conclusion, we looked to the legislative history of the Labor-Management Reporting and Disclosure Act of 1959, Pub. L. 86–257, 73 Stat. 519, which had simultaneously strengthened the secondary boycott prohibition and added the publicity proviso. We noted that a principal source of congressional concern had been the secondary boycott activities of the Teamsters Union, which for the most part represented employees of motor carriers who did not "produce" goods in the technical sense of the verb. The Teamsters' activities were plainly intended to be covered by the new prohibitions in § 8(b)(4)(ii)(B), and we declined to hold that Congress, in using the word "produced," had intended to exclude the Teamsters entirely from the offsetting protections of the proviso. "There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress." 377 U. S., at 55.

The focus of the analysis in *Servette* was on the meaning of the term "producer." In this case, DeBartolo is willing to concede that Wilson distributes products that are "produced" by High within the meaning of the statute. This would mean that construction workers, like truckdrivers, may perform services that are essential to the production and distribution of consumer goods. We may therefore assume in this case that High, the primary employer, is a producer within the meaning of the proviso.[6] Indeed, we may assume here that the proviso's "coverage"—the types of primary disputes it allows to be publicized—is broad enough to include almost any primary dispute that might result in prohibited secondary activity.[7]

We reject, however, the Board's interpretation of the extent of the secondary activity that the proviso permits. The only publicity exempted from the prohibition is publicity intended to inform the public that the primary employer's product is "distributed by" the secondary employer. We are persuaded that Congress included that requirement to reflect the concern that motivates all of § 8(b)(4): "shielding unoffending employers and others from pressures in controversies not their own." *NLRB* v. *Denver Building & Construction Trades Council,* 341 U. S. 675, 692 (1951).[8] In this case, the Board did not find that any product produced by High was being distributed by DeBartolo or any of Wilson's cotenants. Instead, it relied on the theory that there was a symbiotic relationship between them and Wilson, and that DeBartolo and Wilson's cotenants would derive substantial benefit from High's work. That form of analysis would almost strip the distribution requirement of its limiting effect. It diverts the inquiry away from the relationship between the primary and secondary employers and toward the relationship between two secondary employers. It then tests that relationship by a standard so generous that it will be satisfied by virtually any secondary employer that a union might want consumers to boycott. Yet if Congress had intended all peaceful, truthful handbilling that informs the public of a primary dispute to fall within the proviso, the statute would not have contained a distribution requirement.[9]

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[6] Cf. *Local 712, IBEW (Golden Dawn Foods)*, 134 N. L. R. B. 812 (1961) (electrical and refrigeration work); *Plumbers & Pipefitters, Local 142 (Shop-Rite Foods)*, 133 N. L. R. B. 307 (1961) (refrigeration work).

[7] As the Board stated in *International Brotherhood of Teamsters, Local 537 (Lohman Sales Co.)*, 132 N. L. R. B. 901, 907 (1961), "there is no suggestion either in the statute itself or in the legislative history that Congress intended the words 'product' and 'produced' to be words of special limitation."

In this case, DeBartolo is willing to assume that Wilson distributes products that are "produced" by High within the meaning of the statute. Wilson contracted with High to receive the construction services that are the subject of the primary dispute, and the cost of those services will presumably be reflected in the prices of the products sold by Wilson. But the handbills at issue in this case did not merely call for a boycott of Wilson's products; they also called for a boycott of the products being sold by Wilson's cotenants. Neither DeBartolo nor any of the cotenants has any business relationship with High. Nor do they sell any products whose chain of production can reasonably be said to include High. Since there is no justification for treating the products that the cotenants distribute to the public as products produced by High, the Board erred in concluding that the handbills came within the protection of the publicity proviso.

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[8] See also *Longshoremen* v. *Allied International, Inc.*, 456 U. S. 212, 223 (1982); *Carpenters* v. *NLRB*, 357 U. S. 93, 100 (1958); H. R. Rep. No. 245, 80th Cong., 1st Sess., 24 (1947), 1 NLRB, Legislative History of the Labor Management Relations Act of 1947, p. 315 (1948).

[9] The Board concedes in its brief that Congress intended this language to restrict the scope of the proviso. It acknowledges that the product must be "in some manner distributed by the employers at whose customers the nonpicketing publicity is immediately directed." Brief for Respondent NLRB 9.

Stressing the fact that this case arises out of an entirely peaceful and orderly distribution of a written message, rather than picketing, the union argues that its handbilling is a form of speech protected by the First Amendment. The Board, without completely endorsing the union's constitutional argument, contends that it has sufficient force to invoke the Court's prudential policy of construing Acts of Congress so as to avoid the unnecessary decision of serious constitutional questions. See *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 500–501 (1979). That doctrine, however, serves only to authorize the construction of a statute in a manner that is "fairly possible." *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). We do not believe that the Board's expansive reading of the proviso meets that standard.[10]

Nevertheless, we do not reach the constitutional issue in this case. For, as we noted at the outset, the Board has not yet decided whether the handbilling in this case was proscribed by the Act. It rested its decision entirely on the publicity proviso and never considered whether, apart from that proviso, the union's conduct fell within the terms of § 8(b)(4)(ii)(B).[11] Until the statutory question is decided, review of the constitutional issue is premature.

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[10] Concededly, "[t]he proviso was the outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded." *NLRB* v. *Servette, Inc.*, 377 U. S. 46, 55 (1964). Indeed, several legislators referred to the First Amendment explicitly during the debates. *E. g.*, 105 Cong. Rec. 6232 (1959), 2 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, p. 1037 (1959) (Sen. Humphrey); 105 Cong. Rec., at 18135, 2 NLRB Legislative History, at 1722 (Rep. Udall). That fact, however, merely confirms in this case the presumption that underlies *Catholic Bishop* and *Crowell:* when Congress legislates in a fashion that restricts communicative activity, it expects the statutory language to be construed narrowly. See *Catholic Bishop*, 440 U. S., at 507. It does not, however, expect the statutory language to be deprived of substantial practical effect.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[11] Cf. *NLRB* v. *Retail Store Employees*, 447 U. S. 607 (1980) (picket line advocating boycott of substantial portion of secondary employer's business is proscribed); *NLRB* v. *Fruit Packers*, 377 U. S. 58 (1964) *("Tree Fruits")* (picket line advocating boycott of insubstantial portion of secondary employer's business is not proscribed).

CONTAINER CORPORATION OF AMERICA *v.* FRANCHISE TAX BOARD

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 81–523. Argued January 10, 1983—Decided June 27, 1983

California imposes a corporate franchise tax geared to income. It employs the "unitary business" principle and formula apportionment in applying that tax to corporations doing business both inside and outside the State. The formula used—commonly called the "three-factor" formula—is based, in equal parts, on the proportion of a unitary business' total payroll, property, and sales that are located in the State. Appellant paperboard packaging manufacturer is a Delaware corporation headquartered in Illinois and doing business in California and elsewhere. It also has a number of overseas subsidiaries incorporated in the countries in which they operate. In calculating for the tax years in question in this case the share of its net income that was apportionable to California under the three-factor formula, appellant omitted all of its subsidiaries' payroll, property, and sales. Appellee Franchise Tax Board issued notices of additional assessments, the gravamen of which was that appellant should have treated its overseas subsidiaries as part of its unitary business rather than as a passive investment. After paying the additional assessments under protest, appellant brought an action for a refund in California Superior Court, which upheld the additional assessments. The California Court of Appeal affirmed.

Held:

1. California's application of the unitary business principle to appellant and its foreign subsidiaries was proper. Pp. 175–180.

(a) The taxpayer has the burden of showing by "clear and convincing evidence" that the state tax results in extraterritorial values being taxed. This Court will, if reasonably possible, defer to the judgment of state courts in deciding whether a particular set of activities constitutes a "unitary business." The Court's task is to determine whether the state court applied the correct standards to the case, and, if it did, whether its judgment was within the realm of a permissible judgment. Pp. 175–176.

(b) Here, there is no merit to appellant's argument that the Court of Appeal in important part analyzed the case under the incorrect legal standard. Rather, the factors relied upon by the court in holding that appellant and its foreign subsidiaries constituted a unitary business—

which factors included appellant's assistance to its subsidiaries in obtaining equipment and in filling personnel needs that could not be met locally, the substantial role played by appellant in loaning funds to the subsidiaries and guaranteeing loans provided by others, the considerable interplay between appellant and its subsidiaries in the area of corporate expansion, the substantial technical assistance provided by appellant to the subsidiaries, and the supervisory role played by appellant's officers in providing general guidance to the subsidiaries—taken in combination clearly demonstrate that the court reached a conclusion "within the realm of permissible judgment." Pp. 177–180.

2. California's use of the three-factor formula to apportion the income of the unitary business consisting of appellant and its foreign subsidiaries was fair. Appellant had the burden of proving that the income apportioned to California was out of all appropriate proportions to the business transacted in the State. This burden was not met by offering various statistics that appeared to demonstrate not only that wage rates are generally lower in the foreign countries in which appellant's subsidiaries operate but also that those lower wage rates are not offset by lower levels of productivity. It may well be that in addition to the foreign payroll going into the production of any given corrugated container by a foreign subsidiary, there is a California payroll, as well as other California factors, contributing to the same production. The mere fact that this possibility is not reflected in appellant's accounting does not disturb the underlying premises of the formula apportionment method. Pp. 180–184.

3. California had no obligation under the Foreign Commerce Clause to employ the "arm's-length" analysis used by the Federal Government and most foreign nations in evaluating the tax consequences of intercorporate relationships. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434, distinguished. Pp. 184–197.

(a) The double taxation occasioned by the California scheme is not impermissible. Due in part to the difference between a tax on income and a tax on tangible property, California would have trouble avoiding double taxation of corporations subject to its franchise tax even if it adopted the "arm's-length" approach. Moreover, the California tax does not result in "inevitable" double taxation. It would be perverse, simply for the sake of avoiding double taxation, to require California to give up one allocation method that sometimes results in double taxation in favor of another allocation method that sometimes has the same result. Pp. 189–193.

(b) The California tax does not violate the "one voice" standard established in *Japan Line, supra,* under which a state tax at variance with federal policy will be struck down if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive. Three factors weigh strongly against the conclusion that the tax might lead to significant foreign retaliation. The tax does not create an *automatic* "asymmetry" in international taxation, it is imposed on a domestic corporation and not on a foreign entity, and even if foreign nations had a legitimate interest in reducing the tax burden of domestic corporations, appellant is amenable to be taxed in California one way or another and the tax it pays is more the function of California's tax rate than of its allocation method. Moreover, the California tax is not pre-empted by federal law or fatally inconsistent with federal policy. There is no claim that the federal tax statutes themselves provide the necessary pre-emptive force. The requirement of some tax treaties that the Federal Government adopt some form of arm's-length analysis in taxing the domestic income of multinational enterprises is generally waived as to taxes imposed by each of the contracting nations on its own domestic corporations. Tax treaties do not cover the taxing activities of States. And Congress has never enacted legislation designed to regulate state taxation of income. Pp. 193–197.

117 Cal. App. 3d 988, 173 Cal. Rptr. 121, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. POWELL J., filed a dissenting opinion, in which BURGER, C. J., and O'CONNOR, J., joined, *post*, p. 197. STEVENS, J., took no part in the consideration or decision of the case.

Franklin C. Latcham argued the cause for appellant. With him on the briefs was *Prentiss Willson, Jr.*

Neal J. Gobar, Deputy Attorney General of California, argued the cause for appellee. With him on the brief was *George Deukmejian*, Attorney General.*

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*Briefs of *amici curiae* urging reversal were filed by *Marlow W. Cook*, *Lee H. Spence*, and *Robert L. Ash* for Allied Lyons p. l. c. et al.; by *J. Elaine Bialczak* for Coca-Cola Co.; by *George W. Beatty* and *William L. Goldman* for Colgate-Palmolive Co.; by *James H. Peters*, *Paul H. Frankel*, and *Jean A. Walker* for the Committee on State Taxation of the Council of State Chambers of Commerce; by *Valentine Brookes* and *Lawrence V. Brookes* for EMI Limited et al.; by *William H. Allen*, *John B. Jones, Jr.*, and *Mark I. Levy*, for the Financial Executives Institute; by *Neil Papiano* and *Dennis A. Page* for Firestone Tire & Rubber Co.; and by *Jeffrey G. Balkin*, *pro se*, for Jeffrey G. Balkin et al.

Briefs of *amici curiae* urging affirmance were filed by *David H. Leroy*, Attorney General of Idaho, *Theodore V. Spangler, Jr.*, Deputy Attorney

JUSTICE BRENNAN delivered the opinion of the Court.

This is another appeal claiming that the application of a state taxing scheme violates the Due Process and Commerce Clauses of the Federal Constitution. California imposes a corporate franchise tax geared to income. In common with a large number of other States, it employs the "unitary busi-

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General, and *David L. Wilkinson*, Attorney General of Utah, for the State of Idaho et al.; by *Tyrone C. Fahner*, Attorney General, *Fred H. Montgomery*, Special Assistant Attorney General, and *Lloyd B. Foster* for the State of Illinois; by *Michael J. Rieley*, Special Assistant Attorney General, for the State of Montana; by *Jeff Bingaman*, Attorney General, and *Lisa Gillard Gmuca*, Assistant Attorney General, for the State of New Mexico; by *Robert Abrams*, Attorney General, *Francis V. Dow*, Assistant Attorney General, and *Peter H. Schiff* for the State of New York; by *Robert O. Wefald*, Attorney General, and *Kenneth M. Jakes*, Assistant Attorney General, for the State of North Dakota; by *Dave Frohnmayer*, Attorney General, *Stanton F. Long*, Deputy Attorney General, *William F. Gary*, Solicitor General, and *Theodore W. de Looze*, Assistant Attorney General, for the State of Oregon; by *William D. Dexter*, *Wilson Condon*, Attorney General of Alaska, *James R. Eads, Jr.*, *J. D. MacFarlane*, Attorney General of Colorado, *Carl R. Ajello*, Attorney General of Connecticut, *Richard S. Gebelein*, Attorney General of Delaware, *David H. Leroy*, Attorney General of Idaho, and *Theodore V. Spangler, Jr.*, Deputy Attorney General, *Linley E. Pearson*, Attorney General of Indiana, *Robert T. Stephan*, Attorney General of Kansas, *Francis X. Bellotti*, Attorney General of Massachusetts, *Frank K. Kelley*, Attorney General of Michigan, *Warren R. Spannaus*, Attorney General of Minnesota, *John Ashcroft*, Attorney General of Missouri, *Paul L. Douglas*, Attorney General of Nebraska, *Gregory H. Smith*, Attorney General of New Hampshire, *Jeff Bingaman*, Attorney General of New Mexico, *Rufus L. Edmisten*, Attorney General of North Carolina, *M. C. Banks*, Deputy Attorney General, *Robert O. Wefald*, Attorney General of North Dakota, and *Albert R. Hausauer*, Assistant Attorney General, *Dave Frohnmayer*, Attorney General of Oregon, and *David L. Wilkinson*, Attorney General of Utah, for the Multistate Tax Commission et al.; by *Richard B. Geltman* and *Tany S. Hong*, Attorney General of Hawaii, for the National Governors' Association et al.; by *Charles F. Brannan* for the National Farmers Union; for Citizens for Tax Justice et al.; and by *Frank M. Keesling*, *pro se*.

Briefs of *amici curiae* were filed by *Lloyd N. Cutler* and *William T. Lake* for the Government of the Kingdom of the Netherlands; by *John J. Easton, Jr.*, Attorney General, and *Paul P. Hanlon* for the State of ness" principle and formula apportionment in applying that tax to corporations doing business both inside and outside the State. Appellant is a Delaware corporation headquartered in Illinois and doing business in California and elsewhere. It also has a number of overseas subsidiaries incorporated in the countries in which they operate. Appellee is the California authority charged with administering the State's franchise tax. This appeal presents three questions for review: (1) Was it improper for appellee and the state courts to find that appellant and its overseas subsidiaries constituted a "unitary business" for purposes of the state tax? (2) Even if the unitary business finding was proper, do certain salient differences among national economies render the standard three-factor apportionment formula used by California so inaccurate as applied to the multinational enterprise consisting of appellant and its subsidiaries as to violate the constitutional requirement of "fair apportionment"? (3) In any event, did California have an obligation under the Foreign Commerce Clause, U. S. Const., Art. I, §8, cl. 3, to employ the "arm's-length" analysis used by the Federal Government and most foreign nations in evaluating the tax consequences of intercorporate relationships?

I

A

Various aspects of state tax systems based on the "unitary business" principle and formula apportionment have pro-

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Vermont; by *Francis D. Morrissey* and *Peter B. Powles* for the Canadian Imperial Bank of Commerce et al.; by *Don S. Harnack* and *Richard A. Hanson* for Caterpillar Tractor Co.; by *Joanne M. Garvey* and *Roy E. Crawford* for the Committee on Unitary Tax; by *John S. Nolan* for the Confederation of British Industry; by *Norman B. Barker* for Gulf Oil Corp.; by *Anthon S. Cannon, Jr.*, for the International Bankers Association in California et al.; by *Kenneth Heady* for Phillips Petroleum Co.; by *John R. Hupper* and *Paul M. Dodyk* for Shell Petroleum N. V.; by *Norman B. Barker* and *Dean C. Dunlavey* for Sony Corp. et al.; and by *Joseph H. Guttentag*, *Carolyn E. Agger*, and *Daniel M. Lewis* for the Union of Industries of the European Community.

voked repeated constitutional litigation in this Court. See, *e. g.*, *ASARCO Inc.* v. *Idaho State Tax Comm'n*, 458 U. S. 307 (1982); *F. W. Woolworth Co.* v. *Taxation & Revenue Dept.*, 458 U. S. 354 (1982); *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207 (1980); *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U. S. 425 (1980); *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267 (1978); *General Motors Corp.* v. *Washington*, 377 U. S. 436 (1964); *Butler Bros.* v. *McColgan*, 315 U. S. 501 (1942); *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n*, 266 U. S. 271 (1924); *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113 (1920).

Under both the Due Process and the Commerce Clauses of the Constitution, a State may not, when imposing an income-based tax, "tax value earned outside its borders." *ASARCO*, *supra*, at 315. In the case of a more-or-less integrated business enterprise operating in more than one State, however, arriving at precise territorial allocations of "value" is often an elusive goal, both in theory and in practice. See *Mobil Oil Corp.* v. *Commissioner of Taxes*, *supra*, at 438; *Butler Bros.* v. *McColgan*, *supra*, at 507–509; *Underwood Typewriter Co.* v. *Chamberlain*, *supra*, at 121. For this reason and others, we have long held that the Constitution imposes no single formula on the States, *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 445 (1940), and that the taxpayer has the "'distinct burden of showing by "clear and cogent evidence" that [the state tax] results in extraterritorial values being taxed . . . .'" *Exxon Corp.*, *supra*, at 221, quoting *Butler Bros.* v. *McColgan*, *supra*, at 507, in turn quoting *Norfolk & Western R. Co.* v. *North Carolina ex rel. Maxwell*, 297 U. S. 682, 688 (1936).

One way of deriving locally taxable income is on the basis of formal geographical or transactional accounting. The problem with this method is that formal accounting is subject to manipulation and imprecision, and often ignores or captures inadequately the many subtle and largely unquantifiable transfers of value that take place among the components of a single enterprise. See generally *Mobil Oil Corp.*, *supra,* at 438–439, and sources cited. The unitary business/formula apportionment method is a very different approach to the problem of taxing businesses operating in more than one jurisdiction. It rejects geographical or transactional accounting, and instead calculates the local tax base by first defining the scope of the "unitary business" of which the taxed enterprise's activities in the taxing jurisdiction form one part, and then apportioning the total income of that "unitary business" between the taxing jurisdiction and the rest of the world on the basis of a formula taking into account objective measures of the corporation's activities within and without the jurisdiction. This Court long ago upheld the constitutionality of the unitary business/formula apportionment method, although subject to certain constraints. See, *e. g.*, *Hans Rees' Sons, Inc.* v. *North Carolina ex rel. Maxwell*, 283 U. S. 123 (1931); *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n, supra; Underwood Typewriter Co.* v. *Chamberlain, supra.* The method has now gained wide acceptance, and is in one of its forms the basis for the the Uniform Division of Income for Tax Purposes Act (Uniform Act), which has at last count been substantially adopted by 23 States, including California.

B

Two aspects of the unitary business/formula apportionment method have traditionally attracted judicial attention. These are, as one might easily guess, the notions of "unitary business" and "formula apportionment," respectively.

(1)

The Due Process and Commerce Clauses of the Constitution do not allow a State to tax income arising out of interstate activities—even on a proportional basis—unless there is a "'minimal connection' or 'nexus' between the interstate activities and the taxing State, and 'a rational relationship between the income attributed to the State and the intrastate values of the enterprise.'" *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, *supra*, at 219–220, quoting *Mobil Oil Corp.* v. *Commissioner of Taxes*, *supra*, at 436, 437. At the very least, this set of principles imposes the obvious and largely self-executing limitation that a State not tax a purported "unitary business" unless at least some part of it is conducted in the State. See *Exxon Corp.*, *supra*, at 220; *Wisconsin* v. *J. C. Penney Co.*, *supra*, at 444. It also requires that there be some bond of ownership or control uniting the purported "unitary business." See *ASARCO*, *supra*, at 316–317.

In addition, the principles we have quoted require that the out-of-state activities of the purported "unitary business" be related in some concrete way to the in-state activities. The functional meaning of this requirement is that there be some sharing or exchange of value not capable of precise identification or measurement—beyond the mere flow of funds arising out of a passive investment or a distinct business operation—which renders formula apportionment a reasonable method of taxation. See generally *ASARCO*, *supra*, at 317; *Mobil Oil Corp.*, *supra*, at 438–442. In *Underwood Typewriter Co.* v. *Chamberlain*, *supra*, we held that a State could tax on an apportioned basis the combined income of a vertically integrated business whose various components (manufacturing, sales, etc.) operated in different States. In *Bass, Ratcliff & Gretton*, *supra*, we applied the same principle to a vertically integrated business operating across national boundaries. In *Butler Bros.* v. *McColgan*, *supra*, we recognized that the unitary business principle could apply, not only to vertically integrated enterprises, but also to a series of similar enterprises operating separately in various jurisdictions but linked by common managerial or operational resources that produced economies of scale and transfers of value. More recently, we have further refined the "unitary business" concept in *Exxon Corp.* v. *Wisconsin Dept. of Rev-*

enue, 447 U. S. 207 (1980), and *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U. S. 425 (1980), where we upheld the States' unitary business findings, and in *ASARCO Inc.* v. *Idaho State Tax Comm'n*, 458 U. S. 307 (1982), and *F. W. Woolworth Co.* v. *Taxation & Revenue Dept.*, 458 U. S. 354 (1982), in which we found such findings to have been improper.

The California statute at issue in this case, and the Uniform Act from which most of its relevant provisions are derived, track in large part the principles we have just discussed. In particular, the statute distinguishes between the "business income" of a multijurisdictional enterprise, which is apportioned by formula, Cal. Rev. & Tax. Code Ann. §§25128–25136 (West 1979), and its "nonbusiness" income, which is not.[1] Although the statute does not explicitly require that income from distinct business enterprises be apportioned separately, this requirement antedated adoption of the Uniform Act,[2] and has not been abandoned.[3]

A final point that needs to be made about the unitary business concept is that it is not, so to speak, unitary: there are variations on the theme, and any number of them are logically consistent with the underlying principles motivating the approach. For example, a State might decide to respect formal corporate lines and treat the ownership of a corporate subsidiary as *per se* a passive investment.[4] In *Mobil Oil Corp.*, 445 U. S., at 440–441, however, we made clear that, as a general matter, such a *per se* rule is not constitutionally required:

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[1] Certain forms of nonbusiness income, such as dividends, are allocated on the basis of the taxpayer's commercial domicile. Other forms of nonbusiness income, such as capital gains on sales of real property, are allocated on the basis of situs. See Cal. Rev. & Tax. Code Ann. §§25123–25127 (West 1979).

[2] See generally *Honolulu Oil Corp.* v. *Franchise Tax Board*, 60 Cal. 2d 417, 386 P. 2d 40 (1963); *Superior Oil Corp.* v. *Franchise Tax Board*, 60 Cal. 2d 406, 386 P. 2d 33 (1963).

[3] See the opinion of the California Court of Appeal in this case, 117 Cal. App. 3d 988, 990–991, 993–995, 173 Cal. Rptr. 121, 123, 124–126 (1981). See also Cal. Rev. & Tax. Code Ann. §25137 (West 1979) (allowing for separate accounting or other alternative methods of apportionment when total formula apportionment would "not fairly represent the extent of the taxpayer's business activity in this state").

> "Superficially, intercorporate division might appear to be a[n] . . . attractive basis for limiting apportionability. But the form of business organization may have nothing to do with the underlying unity or diversity of business enterprise." *Id.*, at 440.

Thus, for example, California law provides:

> "In the case of a corporation . . . owning or controlling, either directly or indirectly, another corporation, or other corporations, and in the case of a corporation . . . owned or controlled, either directly or indirectly, by another corporation, the Franchise Tax Board may require a consolidated report showing the combined net income or such other facts as it deems necessary." Cal. Rev. & Tax. Code Ann. § 25104 (West 1979).[5]

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[4] We note that the Uniform Act does not speak to this question one way or the other.

[5] See also Cal. Rev. & Tax. Code Ann. § 25105 (West 1979) (defining "ownership or control"). A necessary corollary of the California approach, of course, is that intercorporate dividends in a unitary business *not* be included in gross income, since such inclusion would result in double-counting of a portion of the subsidiary's income (first as income attributed to the unitary business, and second as dividend income to the parent). See § 25106.

Some States, it should be noted, have adopted a hybrid approach. In *Mobil* itself, for example, a nondomiciliary State invoked a unitary business justification to include an apportioned share of certain corporate dividends in the gross income of the taxpayer, but did not require a combined return and combined apportionment. The Court in *Mobil* held that the taxpayer's objection to this approach had not been properly raised in the state proceedings. 445 U. S., at 441, n. 15. JUSTICE STEVENS, however, reached the merits, stating in part: "Either Mobil's worldwide 'petroleum enterprise' is all part of one unitary business, or it is not; if it is, Vermont must evaluate the entire enterprise in a consistent manner." *Id.*, at 461 (citation omitted). See *id.*, at 462 (STEVENS, J., dissenting) (outlining al-

Even among States that take this approach, however, only some apply it in taxing American corporations with subsidiaries located in foreign countries.[6] The difficult question we address in Part V of this opinion is whether, for reasons not implicated in *Mobil,*[7] that particular variation on the theme is constitutionally barred.

(2)

Having determined that a certain set of activities constitute a "unitary business," a State must then apply a formula apportioning the income of that business within and without the State. Such an apportionment formula must, under both the Due Process and Commerce Clauses, be fair. See *Exxon Corp., supra,* at 219, 227–228; *Moorman Mfg. Co.,* 437 U. S., at 272–273; *Hans Rees' Sons, Inc.,* 283 U. S., at 134. The first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency—that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed. The second and more difficult requirement is what might be called external consistency—the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated. The Constitution does not "invalidat[e] an apportionment formula whenever it *may* result in taxation

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ternative approaches available to State); cf. The Supreme Court, 1981 Term, 96 Harv. L. Rev. 62, 93–96 (1982).

[6] See generally General Accounting Office Report to the Chairman, House Committee on Ways and Means: Key Issues Affecting State Taxation of Multijurisdictional Corporate Income Need Resolving 31 (1982).

[7] *Mobil* did, in fact, involve income from foreign subsidiaries, but that fact was of little importance to the case for two reasons. First, as discussed in n. 5, *supra,* the State in that case included *dividends* from the subsidiaries to the parent in its calculation of the parent's apportionable taxable income, but did not include the underlying income of the subsidiaries themselves. Second, the taxpayer in that case conceded that the dividends could be taxed *somewhere* in the United States, so the actual issue before the Court was merely whether a particular State could be barred from imposing some portion of that tax. See 445 U. S., at 447.

of some income that did not have its source in the taxing State . . . ." *Moorman Mfg. Co., supra,* at 272 (emphasis added). See *Underwood Typewriter Co.,* 254 U. S., at 120–121. Nevertheless, we will strike down the application of an apportionment formula if the taxpayer can prove "by 'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportions to the business transacted . . . in that State,' *[Hans Rees' Sons, Inc.,]* 283 U. S., at 135, or has 'led to a grossly distorted result,' [*Norfolk & Western R. Co.* v. *State Tax Comm'n,* 390 U. S. 317, 326 (1968)]." *Moorman Mfg. Co., supra,* at 274.

California and the other States that have adopted the Uniform Act use a formula—commonly called the "three-factor" formula—which is based, in equal parts, on the proportion of a unitary business' total payroll, property, and sales which are located in the taxing State. See Cal. Tax & Rev. Code Ann. §§25128–25136 (West 1979). We approved the three-factor formula in *Butler Bros.* v. *McColgan,* 315 U. S. 501 (1942). Indeed, not only has the three-factor formula met our approval, but it has become, for reasons we discuss in more detail *infra,* at 183, something of a benchmark against which other apportionment formulas are judged. See *Moorman Mfg. Co., supra,* at 282 (BLACKMUN, J., dissenting); cf. *General Motors Corp.* v. *District of Columbia,* 380 U. S. 553, 561 (1965).

Besides being fair, an apportionment formula must, under the Commerce Clause, also not result in discrimination against interstate or foreign commerce. See *Mobil Oil Corp., supra,* at 444; cf. *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U. S. 434, 444–448 (1979) (property tax). Aside from forbidding the obvious types of discrimination against interstate or foreign commerce, this principle might have been construed to require that a state apportionment formula not differ so substantially from methods of allocation used by other jurisdictions in which the taxpayer is subject to taxation as to produce double taxation of the same income and a resultant tax burden higher than the taxpayer would incur if its business were limited to any one jurisdiction. At least in the interstate commerce context, however, the anti-discrimination principle has not in practice required much in addition to the requirement of fair apportionment. In *Moorman Mfg. Co.* v. *Bair, supra,* in particular, we explained that eliminating all overlapping taxation would require this Court to establish not only a single constitutionally mandated method of taxation, but also rules regarding the application of that method in particular cases. 437 U. S., at 278–280. Because that task was thought to be essentially legislative, we declined to undertake it, and held that a fairly apportioned tax would not be found invalid simply because it differed from the prevailing approach adopted by the States. As we discuss *infra,* at 185–187, however, a more searching inquiry is necessary when we are confronted with the possibility of international double taxation.

II

A

Appellant is in the business of manufacturing custom-ordered paperboard packaging. Its operation is vertically integrated, and includes the production of paperboard from raw timber and wastepaper as well as its composition into the finished products ordered by customers. The operation is also largely domestic. During the years at issue in this case—1963, 1964, and 1965—appellant controlled 20 foreign subsidiaries located in four Latin American and four European countries. Its percentage ownership of the subsidiaries (either directly or through other subsidiaries) ranged between 66.7% and 100%. In those instances (about half) in which appellant did not own a 100% interest in the subsidiary, the remainder was owned by local nationals. One of the subsidiaries was a holding company that had no payroll, sales, or property, but did have book income. Another was inactive. The rest were all engaged—in their respective local markets—in essentially the same business as appellant.

Most of appellant's subsidiaries were, like appellant itself, fully integrated, although a few bought paperboard and other intermediate products elsewhere. Sales of materials from appellant to its subsidiaries accounted for only about 1% of the subsidiaries' total purchases. The subsidiaries were also relatively autonomous with respect to matters of personnel and day-to-day management. For example, transfers of personnel from appellant to its subsidiaries were rare, and occurred only when a subsidiary could not fill a position locally. There was no formal United States training program for the subsidiaries' employees, although groups of foreign employees occasionally visited the United States for 2–6 week periods to familiarize themselves with appellant's methods of operation. Appellant charged one senior vice president and four other officers with the task of overseeing the operations of the subsidiaries. These officers established general standards of professionalism, profitability, and ethical practices and dealt with major problems and long-term decisions; day-to-day management of the subsidiaries, however, was left in the hands of local executives who were always citizens of the host country. Although local decisions regarding capital expenditures were subject to review by appellant, problems were generally worked out by consensus rather than outright domination. Appellant also had a number of its directors and officers on the boards of directors of the subsidiaries, but they did not generally play an active role in management decisions.[8]

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[8] There were a number of reasons for appellant's relatively hands-off attitude toward the management of its subsidiaries. First, it comported with the company's general management philosophy emphasizing local responsibility and accountability; in this respect, the treatment of the foreign subsidiaries was similar to the organization of appellant's domestic geographical divisions. Second, it reflected the fact that the packaging industry, like the advertising industry to which it is closely related, is highly

Nevertheless, in certain respects, the relationship between appellant and its subsidiaries was decidedly close. For example, approximately half of the subsidiaries' long-term debt was either held directly, or guaranteed, by appellant. Appellant also provided advice and consultation regarding manufacturing techniques, engineering, design, architecture, insurance, and cost accounting to a number of its subsidiaries, either by entering into technical service agreements with them or by informal arrangement. Finally, appellant occasionally assisted its subsidiaries in their procurement of equipment, either by selling them used equipment of its own or by employing its own purchasing department to act as an agent for the subsidiaries.[9]

B

During the tax years at issue in this case, appellant filed California franchise tax returns. In 1969, after conducting an audit of appellant's returns for the years in question, appellee issued notices of additional assessments for each of those years. The respective approaches and results reflected in appellant's initial returns and in appellee's notices of additional assessments capture the legal differences at issue in this case.[10]

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sensitive to differences in consumer habits and economic development among different nations, and therefore requires a good dose of local expertise to be successful. Third, appellant's policy was designed to appeal to the sensibilities of local customers and governments.

[9] There was also a certain spillover of goodwill between appellant and its subsidiaries; that is, appellant's customers who had overseas needs would on occasion ask appellant's sales representatives to recommend foreign firms, and, where possible, the representatives would refer the customers to appellant's subsidiaries. In at least one instance, appellant became involved in the actual negotiation of a contract between a customer and a foreign subsidiary.

[10] After the notices of additional tax, there followed a series of further adjustments, payments, claims for refunds, and assessments, whose combined effect was to render the figures outlined in text more illustrative

In calculating the total unapportioned taxable income of its unitary business, appellant included its own corporate net earnings as derived from its federal tax form (subject to certain adjustments not relevant here), but did not include any income of its subsidiaries. It also deducted—as it was authorized to do under state law, see *supra*, at 167, and n. 1—all dividend income, nonbusiness interest income, and gains on sales of assets not related to the unitary business. In calculating the share of its net income which was apportionable to California under the three-factor formula, appellant omitted all of its subsidiaries' payroll, property, and sales. The results of these calculations are summarized in the margin.[11]

The gravamen of the notices issued by appellee in 1969 was that appellant should have treated its overseas subsidiaries as part of its unitary business rather than as passive investments. Including the overseas subsidiaries in appellant's unitary business had two primary effects: it increased the income subject to apportionment by an amount equal to the total income of those subsidiaries (less intersubsidiary dividends, see n. 5, *supra*), and it decreased the percentage of that income which was apportionable to California. The net

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than real as descriptions of the present claims of the parties with regard to appellant's total tax liability. These subsequent events, however, did not concern the legal issues raised in this case, nor did they remove either party's financial stake in the resolution of those issues. We therefore disregard them for the sake of simplicity.

[11]

	Total income of unitary business	*Percentage attributed to California*	*Amount attributed to California*	*Tax (5.5%)*
1963....	$26,870,427.00	11.041	$2,966,763.85	$163,172.01
1964....	28,774,320.48	10.6422	3,062,220.73	168,422.14
1965....	32,280,842.90	9.8336	3,174,368.97	174,590.29

See Exhibit A–7 to Stipulation; Record 36, 76, 77, 79, 104, 126.

effect, however, was to increase appellant's tax liability in each of the three years.[12]

Appellant paid the additional amounts under protest, and then sued in California Superior Court for a refund, raising the issues now before this Court. The case was tried on stipulated facts, and the Superior Court upheld appellee's assessments. On appeal, the California Court of Appeal affirmed, 117 Cal. App. 3d 988, 173 Cal. Rptr. 121 (1981), and the California Supreme Court refused to exercise discretionary review. We noted probable jurisdiction. 456 U. S. 960 (1982).

III

A

We address the unitary business issue first. As previously noted, the taxpayer always has the "distinct burden of showing by 'clear and cogent evidence' that [the state tax] results in extraterritorial values being taxed." *Supra*, at 164. One necessary corollary of that principle is that this Court will, if reasonably possible, defer to the judgment of state courts in deciding whether a particular set of activities constitutes a "unitary business." As we said in a closely related context in *Norton Co.* v. *Department of Revenue*, 340 U. S. 534 (1951):

> "The general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption.

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[12] According to the notices, appellant's actual tax obligations were as follows:

	Total income of unitary business	*Percentage attributed to California*	*Amount attributed to California*	*Tax (5.5%)*
1963....	$37,348,183.00	8.6886	$3,245,034.23	$178,476.88
1964....	44,245,879.00	8.3135	3,673,381.15	202,310.95
1965....	46,884,966.00	7.6528	3,588,012.68	197,340.70

See Exhibit A-7 to Stipulation; Record 76, 77, 79.

> "*This burden is never met merely by showing a fair difference of opinion which as an original matter might be decided differently.* . . . Of course, in constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence." *Id.*, at 537–538 (footnotes omitted; emphasis added).[13]

See *id.*, at 538 (concluding that, "in light of all the evidence, the [state] judgment [on a question of whether income should be attributed to the State] was within the realm of permissible judgment"). The legal principles defining the constitutional limits on the unitary business principle are now well established. The factual records in such cases, even when the parties enter into a stipulation, tend to be long and complex, and the line between "historical fact" and "constitutional fact" is often fuzzy at best. Cf. *ASARCO*, 458 U. S., at 326–328, nn. 22, 23. It will do the cause of legal certainty little good if this Court turns every colorable claim that a state court erred in a particular application of those principles into a *de novo* adjudication, whose unintended nuances would then spawn further litigation and an avalanche of critical comment.[14] Rather, our task must be to determine whether the state court applied the correct standards to the case; and if it did, whether its judgment "was within the realm of permissible judgment."[15]

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[13] This approach is, of course, quite different from the one we follow in certain other constitutional contexts. See, *e. g.*, *Brooks* v. *Florida*, 389 U. S. 413 (1967); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 285 (1964).

[14] It should also go without saying that not every claim that a state court erred in making a unitary business finding will pose a substantial federal question in the first place.

[15] *ASARCO* and *F. W. Woolworth* are consistent with this standard of review. *ASARCO* involved a claim that a parent and certain of its partial subsidiaries, in which it held either minority interests or bare majority interests, were part of the same unitary business. The State Supreme

B

In this case, we are singularly unconvinced by appellant's argument that the State Court of Appeal "in important part analyzed this case under a different legal standard," *F. W. Woolworth*, 458 U. S., at 363, from the one articulated by this Court. Appellant argues that the state court here, like the state court in *F. W. Woolworth*, improperly relied on appellant's mere *potential* to control the operations of its subsidiaries as a dispositive factor in reaching its unitary business finding. In fact, although the state court mentioned that "major policy decisions of the subsidiaries were subject to review by appellant," 117 Cal. App. 3d, at 998, 173 Cal. Rptr., at 127, it relied principally, in discussing the management relationship between appellant and its subsidiaries, on the more concrete observation that "[h]igh officials of appellant gave directions to subsidiaries for compliance with the parent's standard of professionalism, profitability, and ethical practices." *Id.*, at 998, 173 Cal. Rptr., at 127–128.[16]

Court upheld the claim. We concluded, *relying on factual findings made by the state courts*, that a unitary business finding was impermissible because the partial subsidiaries were not realistically subject to even minimal control by ASARCO, and were therefore passive investments in the most basic sense of the term. 458 U. S., at 320–324. We held specifically that to accept the State's theory of the case would not only constitute a misapplication of the unitary business concept, but would "destroy" the concept entirely. *Id.*, at 326.

F. W. Woolworth was a much closer case, involving one partially owned subsidiary and three wholly owned subsidiaries. We examined the evidence in some detail, and reversed the state court's unitary business finding, but only after concluding that the state court had made specific and crucial legal errors, not merely in the conclusions it drew, but in the legal standard it applied in analyzing the case. 458 U. S., at 363–364.

[16] In any event, although potential control is, as we said in *F. W. Woolworth*, not "*dispositive*" of the unitary business issue, *id.*, at 362 (emphasis added), it is *relevant*, both to whether or not the components of the purported unitary business share that degree of common ownership which is a prerequisite to a finding of unitariness, and also to whether there might exist a degree of implicit control sufficient to render the parent and the subsidiary an integrated enterprise.

Appellant also argues that the state court erred in endorsing an administrative presumption that corporations engaged in the same line of business are unitary. This presumption affected the state court's reasoning, but only as one element among many. Moreover, considering the limited use to which it was put, we find the "presumption" criticized by appellant to be reasonable. Investment in a business enterprise truly "distinct" from a corporation's main line of business often serves the primary function of diversifying the corporate portfolio and reducing the risks inherent in being tied to one industry's business cycle. When a corporation invests in a subsidiary that engages in the same line of work as itself, it becomes much more likely that one function of the investment is to make better use—either through economies of scale or through operational integration or sharing of expertise—of the parent's existing business-related resources.

Finally, appellant urges us to adopt a bright-line rule requiring as a prerequisite to a finding that a mercantile or manufacturing enterprise is unitary that it be characterized by "a substantial flow of goods." Brief for Appellant 47. We decline this invitation. The prerequisite to a constitutionally acceptable finding of unitary business is a flow of *value*, not a flow of goods.[17] As we reiterated in *F. W. Wool-*

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[17] As we state *supra*, at 167–169, there is a wide range of constitutionally acceptable variations on the unitary business theme. Thus, a leading scholar has suggested that a "flow of goods" requirement would provide a reasonable and workable bright-line test for unitary business, see Hellerstein, Recent Developments in State Tax Apportionment and the Circumscription of Unitary Business, 21 Nat. Tax J. 487, 501–502 (1968); Hellerstein, Allocation and Apportionment of Dividends and the Delineation of the Unitary Business, 14 Tax Notes 155 (Jan. 25, 1982), and some state courts have adopted such a test, see, *e. g.*, *Commonwealth* v. *ACF Industries, Inc.*, 441 Pa. 129, 271 A. 2d 273 (1970). But see, *e. g.*, McLure, Operational Interdependence Is Not the Appropriate "Bright Line Test" of a Unitary Business—At Least Not Now, 18 Tax Notes 107 (Jan. 10, 1983). However sensible such a test may be as a policy matter, however, we see no reason to impose it on all the States as a requirement of constitutional law. Cf. *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 445 (1940).

worth, a relevant question in the unitary business inquiry is whether "'contributions to income [of the subsidiaries] result[ed] from functional integration, centralization of management, and economies of scale.'" 458 U. S., at 364, quoting *Mobil*, 445 U. S., at 438. "[S]ubstantial mutual interdependence," *F. W. Woolworth*, *supra*, at 371, can arise in any number of ways; a substantial flow of goods is clearly one but just as clearly not the only one.

C

The State Court of Appeal relied on a large number of factors in reaching its judgment that appellant and its foreign subsidiaries constituted a unitary business. These included appellant's assistance to its subsidiaries in obtaining used and new equipment and in filling personnel needs that could not be met locally, the substantial role played by appellant in loaning funds to the subsidiaries and guaranteeing loans provided by others, the "considerable interplay between appellant and its foreign subsidiaries in the area of corporate expansion," 117 Cal. App. 3d, at 997, 173 Cal. Rptr., at 127, the "substantial" technical assistance provided by appellant to the subsidiaries, *id.*, at 998–999, 173 Cal. Rptr., at 128, and the supervisory role played by appellant's officers in providing general guidance to the subsidiaries. In each of these respects, this case differs from *ASARCO* and *F. W. Woolworth*,[18] and clearly comes closer than those cases did to presenting a "functionally integrated enterprise," *Mobil*, *supra*, at 440, which the State is entitled to tax as a single entity. We need not decide whether any one of these factors would be sufficient as a constitutional matter to prove the existence of a unitary business. Taken in combination, at least, they clearly demonstrate that the state court reached a conclusion "within the realm of permissible judgment."[19]

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[18] See n. 15, *supra*. See also, *e. g.*, *F. W. Woolworth*, 458 U. S., at 365 ("*no* phase of any subsidiary's business was integrated with the parent's"); *ibid.* (undisputed testimony stated that each subsidiary made business decisions independently of parent); *id.*, at 366 ("each subsidiary was responsible for obtaining its own financing from sources other than the parent"); *ibid.* ("With one possible exception, none of the subsidiaries' officers during the year in question was a current or former employee of the parent") (footnote omitted).

IV

We turn now to the question of fair apportionment. Once again, appellant has the burden of proof; it must demonstrate that there is "'no rational relationship between the income attributed to the State and the intrastate values of the enterprise,'" *Exxon Corp.*, 447 U. S., at 220, quoting *Mobil, supra*, at 437, by proving that the income apportioned to

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[19] Two of the factors relied on by the state court deserve particular mention. The first of these is the flow of capital resources from appellant to its subsidiaries through loans and loan guarantees. There is no indication that any of these capital transactions were conducted at arm's length, and the resulting flow of value is obvious. As we made clear in another context in *Corn Products Refining Co.* v. *Commissioner*, 350 U. S. 46, 50–53 (1955), capital transactions can serve either an investment function or an operational function. In this case, appellant's loans and loan guarantees were clearly part of an effort to ensure that "[t]he overseas operations of [appellant] continue to grow and to become a more substantial part of the company's strength and profitability." Container Corporation of America, 1964 Annual Report 6, reproduced in Exhibit I to Stipulation of Facts. See generally *id.*, at 6–9, 11.

The second noteworthy factor is the managerial role played by appellant in its subsidiaries' affairs. We made clear in *F. W. Woolworth Co.* that a unitary business finding could not be based merely on "the type of occasional oversight—with respect to capital structure, major debt, and dividends—that any parent gives to an investment in a subsidiary . . . ." 458 U. S., at 369. As *Exxon* illustrates, however, mere decentralization of day-to-day management responsibility and accountability cannot defeat a unitary business finding. 447 U. S., at 224. The difference lies in whether the management role that the parent does play is grounded in its own operational expertise and its overall operational strategy. In this case, the business "guidelines" established by appellant for its subsidiaries, the "consensus" process by which appellant's management was involved in the subsidiaries' business decisions, and the sometimes uncompensated technical assistance provided by appellant, all point to precisely the sort of operational role we found lacking in *F. W. Woolworth.*

California under the statute is "out of all appropriate proportion to the business transacted by the appellant in that State," *Hans Rees' Sons, Inc.*, 283 U. S., at 135.

Appellant challenges the application of California's three-factor formula to its business on two related grounds, both arising as a practical (although not a theoretical) matter out of the international character of the enterprise. First, appellant argues that its foreign subsidiaries are significantly more profitable than it is, and that the three-factor formula, by ignoring that fact and relying instead on indirect measures of income such as payroll, property, and sales, systematically distorts the true allocation of income between appellant and the subsidiaries. The problem with this argument is obvious: the profit figures relied on by appellant are based on precisely the sort of formal geographical accounting whose basic theoretical weaknesses justify resort to formula apportionment in the first place. Indeed, we considered and rejected a very similar argument in *Mobil*, pointing out that whenever a unitary business exists,

> "separate [geographical] accounting, while it purports to isolate portions of income received in various States, may fail to account for contributions to income resulting from functional integration, centralization of management, and economies of scale. Because these factors of profitability arise from the operation of the business as a whole, it becomes misleading to characterize the income of the business as having a single identifiable 'source.' Although separate geographical accounting may be useful for internal auditing, for purposes of state taxation it is not constitutionally required." 445 U. S., at 438 (citation omitted).

Appellant's second argument is related, and can be answered in the same way. Appellant contends:

> "The costs of production in foreign countries are generally significantly lower than in the United States, pri-

> marily as a result of the lower wage rates of workers in countries other than the United States. Because wages are one of the three factors used in formulary apportionment, the use of the formula unfairly inflates the amount of income apportioned to United States operations, where wages are higher." Brief for Appellant 12.

Appellant supports this argument with various statistics that appear to demonstrate, not only that wage rates are generally lower in the foreign countries in which its subsidiaries operate, but also that those lower wages are not offset by lower levels of productivity. Indeed, it is able to show that at least one foreign plant had labor costs per thousand square feet of corrugated container that were approximately 40% of the same costs in appellant's California plants.

The problem with all this evidence, however, is that it does not by itself come close to impeaching the basic rationale behind the three-factor formula. Appellant and its foreign subsidiaries have been determined to be a unitary business. It therefore may well be that in addition to the foreign payroll going into the production of any given corrugated container by a foreign subsidiary, there is also California payroll, as well as other California factors, contributing—albeit more indirectly—to the same production. The mere fact that this possibility is not reflected in appellant's accounting does not disturb the underlying premises of the formula apportionment method.

Both geographical accounting and formula apportionment are imperfect proxies for an ideal which is not only difficult to achieve in practice, but also difficult to describe in theory. Some methods of formula apportionment are particularly problematic because they focus on only a small part of the spectrum of activities by which value is generated. Although we have generally upheld the use of such formulas, see, *e. g.*, *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267 (1978); *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113 (1920), we have on occasion found the distortive effect of focusing on only one factor so outrageous in a particular case as to require reversal. In *Hans Rees' Sons, Inc.* v. *North Carolina ex rel. Maxwell, supra,* for example, an apportionment method based entirely on ownership of tangible property resulted in an attribution to North Carolina of between 66% and 85% of the taxpayer's income over the course of a number of years, while a separate accounting analysis purposely skewed to resolve all doubts in favor of the State resulted in an attribution of no more than 21.7%. We struck down the application of the one-factor formula to that particular business, holding that the method, "albeit fair on its face, operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction." *Id.*,at 134.

The three-factor formula used by California has gained wide approval precisely because payroll, property, and sales appear in combination to reflect a very large share of the activities by which value is generated. It is therefore able to avoid the sorts of distortions that were present in *Hans Rees' Sons, Inc.*

Of course, even the three-factor formula is necessarily imperfect.[20] But we have seen no evidence demonstrating that the margin of error (systematic or not) inherent in the three-factor formula is greater than the margin of error (systematic or not) inherent in the sort of separate accounting urged upon us by appellant. Indeed, it would be difficult to come to such a conclusion on the basis of the figures in this case: for all of appellant's statistics showing allegedly enormous distortions caused by the three-factor formula, the tables we set out at nn. 11, 12, *supra*, reveal that the percentage increase in taxable income attributable to California between the methodology employed by appellant and the methodology employed by appellee comes to approximately 14%, a far cry from the more than 250% difference which led us to strike down the state tax in *Hans Rees' Sons, Inc.*, and a figure certainly within the substantial margin of error inherent in any method of attributing income among the components of a unitary business. See also *Moorman Mfg. Co.*, *supra*, at 272–273; *Ford Motor Co.* v. *Beauchamp*, 308 U. S. 331 (1939); *Underwood Typewriter Co.*, *supra*, at 120–121.

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[20] First, the one-third-each weight given to the three factors is essentially arbitrary. Second, payroll, property, and sales still do not exhaust the entire set of factors arguably relevant to the production of income. Finally, the relationship between each of the factors and income is by no means exact. The three-factor formula, as applied to horizontally linked enterprises, is based in part on the very rough economic assumption that rates of return on property and payroll—as such rates of return would be measured by an ideal accounting method that took all transfers of value into account—are roughly the same in different taxing jurisdictions. This assumption has a powerful basis in economic theory: if true rates of return were radically different in different jurisdictions, one might expect a significant shift in investment resources to take advantage of that difference. On the other hand, the assumption has admitted weaknesses: an enterprise's willingness to invest simultaneously in two jurisdictions with very different true rates of return might be adequately explained by, for example, the difficulty of shifting resources, the decreasing marginal value of additional investment, and portfolio-balancing considerations.

V

For the reasons we have just outlined, we conclude that California's application of the unitary business principle to appellant and its foreign subsidiaries was proper, and that its use of the standard three-factor formula to apportion the income of that unitary business was fair. This proper and fair method of taxation happens, however, to be quite different from the method employed both by the Federal Government in taxing appellant's business, and by each of the relevant foreign jurisdictions in taxing the business of appellant's subsidiaries. Each of these other taxing jurisdictions has adopted a qualified separate accounting approach—often referred to as the "arm's-length" approach—to the taxation of related corporations.[21] Under the "arm's-length" approach, every corporation, even if closely tied to other corporations, is treated for most—but decidedly not all—purposes as if it were an independent entity dealing at arm's length with its affiliated corporations, and subject to taxation only by the jurisdictions in which it operates and only for the income it realizes on its own books.

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[21] The "arm's-length" approach is also often applied to geographically distinct divisions of a single corporation.

If the unitary business consisting of appellant and its subsidiaries were entirely domestic, the fact that different jurisdictions applied different methods of taxation to it would probably make little constitutional difference, for the reasons we discuss *supra,* at 170–171. Given that it is international, however, we must subject this case to the additional scrutiny required by the Foreign Commerce Clause. See *Mobil Oil Corp.,* 445 U. S., at 446; *Japan Line, Ltd.,* 441 U. S., at 446; *Bowman* v. *Chicago & N. W. R. Co.,* 125 U. S. 465, 482 (1888). The case most relevant to our inquiry is *Japan Line.*

A

Japan Line involved an attempt by California to impose an apparently fairly apportioned, nondiscriminatory, ad valorem property tax on cargo containers which were instrumentalities of foreign commerce and which were temporarily located in various California ports. The same cargo containers, however, were subject to an unapportioned property tax in their home port of Japan. Moreover, a convention signed by the United States and Japan made clear, at least, that neither National Government could impose a tax on temporarily imported cargo containers whose home port was in the other nation. We held that "[w]hen a State seeks to tax the instrumentalities of foreign commerce, two additional considerations, beyond those articulated in [the doctrine governing the Interstate Commerce Clause], come into play." 441 U. S., at 446. The first is the enhanced risk of multiple taxation. Although consistent application of the fair apportionment standard can generally mitigate, if not eliminate, double taxation in the domestic context,

> "neither this Court nor this Nation can ensure full apportionment when one of the taxing entities is a foreign sovereign. If an instrumentality of commerce is domiciled abroad, the country of domicile may have the right, consistently with the custom of nations, to impose a tax on its full value. If a State should seek to tax the same instrumentality on an apportioned basis, multiple taxation inevitably results. . . . Due to the absence of an authoritative tribunal capable of ensuring that the aggregation of taxes is computed on no more than one full value, a state tax, even though 'fairly apportioned' to reflect an instrumentality's presence within the State, may subject foreign commerce '"to the risk of a double tax burden to which [domestic] commerce is not exposed, and which the commerce clause forbids."'" *Id.*, at 447–448, quoting *Evco* v. *Jones*, 409 U. S. 91, 94 (1972), in turn quoting *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 311 (1938) (footnote omitted).

The second additional consideration that arises in the foreign commerce context is the possibility that a state tax will "impair federal uniformity in an area where federal uniformity is essential." 441 U. S., at 448.

> "A state tax on instrumentalities of foreign commerce may frustrate the achievement of federal uniformity in several ways. If the State imposes an apportioned tax, international disputes over reconciling apportionment formulae may arise. If a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against American-owned instrumentalities present in their jurisdictions. . . . If other States followed the taxing State's example, various instrumentalities of commerce could be subjected to varying degrees of multiple taxation, a result that would plainly prevent this Nation from 'speaking with one voice' in regulating foreign commerce." *Id.*, at 450–451 (footnote omitted).

On the basis of the facts in *Japan Line*, we concluded that the California tax at issue was constitutionally improper because it failed to meet either of the additional tests mandated by the Foreign Commerce Clause. *Id.*, at 451–454.

This case is similar to *Japan Line* in a number of important respects. First, the tax imposed here, like the tax imposed in *Japan Line*, has resulted in actual double taxation, in the sense that some of the income taxed without apportionment by foreign nations as attributable to appellant's foreign subsidiaries was also taxed by California as attributable to the State's share of the total income of the unitary business of which those subsidiaries are a part.[22] Second, that double taxation stems from a serious divergence in the taxing schemes adopted by California and the foreign taxing authorities. Third, the taxing method adopted by those foreign taxing authorities is consistent with accepted international practice. Finally, our own Federal Government, to the degree it has spoken, seems to prefer the taxing method adopted by the international community to the taxing method adopted by California.[23]

Nevertheless, there are also a number of ways in which this case is clearly distinguishable from *Japan Line*.[24] First, it involves a tax on income rather than a tax on property. We distinguished property from income taxation in *Mobil Oil Corp.*, 445 U. S., at 444–446, and *Exxon Corp.*, 447 U. S., at 228–229, suggesting that "[t]he reasons for allocation to a single situs that often apply in the case of property taxation carry little force" in the case of income taxation. 445 U. S., at 445. Second, the double taxation in this case, although real, is not the "inevitabl[e]" result of the California taxing scheme. Cf. *Japan Line*, 441 U. S., at 447. In *Japan Line*, we relied strongly on the fact that one taxing jurisdiction claimed the right to tax a given value in full, and another taxing jurisdiction claimed the right to tax the same entity in part—a combination resulting necessarily in double taxation. *Id.*, at 447, 452, 455. Here, by contrast, we are faced with two distinct methods of allocating the income of a multinational enterprise. The "arm's-length" approach divides the pie on the basis of formal accounting principles. The formula apportionment method divides the same pie on the basis of a mathematical generalization. Whether the combination of the two methods results in the same income being taxed twice or in some portion of income not being taxed at all is dependent solely on the facts of the individual case.[25] The third difference between this case and *Japan Line* is that the tax here falls, not on the foreign owners of an instrumentality of foreign commerce, but on a corporation domiciled and headquartered in the United States. We specifically left open in *Japan Line* the application of that case to "domesti-

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[22] The stipulation of facts indicates that the tax returns filed by appellant's subsidiaries in their foreign domiciles took into account "only the applicable income and deductions incurred by the subsidiary or subsidiaries in that country and not . . . the income and deductions of [appellant] or the subsidiaries operating in other countries." App. 72. This does not conclusively demonstrate the existence of double taxation because appellant has not produced its foreign tax returns, and it is entirely possible that deductions, exemptions, or adjustments in those returns eliminated whatever overlap in taxable income resulted from the application of the California apportionment method. Nevertheless, appellee does not seriously dispute the existence of actual double taxation as we have defined it, Brief for Appellee 114–121, but cf. Tr. of Oral Arg. 28–29, and we assume its existence for the purposes of our analysis. Cf. *Japan Line*, 441 U. S., at 452, n. 17.

[23] But see *infra*, at 196–197 (discussing whether state scheme is preempted by federal law).

[24] Note that we deliberately emphasized in *Japan Line* the narrowness of the question presented: "whether instrumentalities of commerce that are

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owned, based, and registered abroad and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a State." 441 U. S., at 444.

[25] Indeed, in *Chicago Bridge & Iron Co.* v. *Caterpillar Tractor Co.*, No. 81–349, which was argued last Term and carried over to this Term, application of worldwide combined apportionment resulted in a refund to the taxpayer from the amount he had paid under a tax return that included neither foreign income nor foreign apportionment factors.

cally owned instrumentalities engaged in foreign commerce," *id.*, at 444, n. 7, and—to the extent that corporations can be analogized to cargo containers in the first place—this case falls clearly within that reservation.[26]

In light of these considerations, our task in this case must be to determine whether the distinctions between the present tax and the tax at issue in *Japan Line* add up to a constitutionally significant difference. For the reasons we are about to explain, we conclude that they do.

B

In *Japan Line*, we said that "[e]ven a slight overlapping of tax—a problem that might be deemed *de minimis* in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned." *Id.*, at 456 (footnote omitted). If we were to take that statement as an absolute prohibition on state-induced double taxation in the international context, then our analysis here would be at an end. But, in fact, such an absolute rule is no more appropriate here than it was in *Japan Line* itself, where we relied on much more than the mere fact of double taxation to strike down the state tax at issue. Although double taxation in the foreign commerce context deserves to receive close scrutiny, that scrutiny must take into account the context in which the double taxation takes place and the alternatives reasonably available to the taxing State.

In *Japan Line*, the taxing State could entirely eliminate one important source of double taxation simply by adhering to one bright-line rule: do not tax, to any extent whatsoever, cargo containers "that are owned, based, and registered abroad and that are used exclusively in international commerce . . . ." *Id.*, at 444. To require that the State adhere to this rule was by no means unfair, because the rule did no more than reflect consistent international practice and express federal policy. In this case, California could try to avoid double taxation simply by not taxing appellant's income at all, even though a good deal of it is plainly domestic. But no party has suggested such a rule, and its obvious unfairness requires no elaboration. Or California could try to avoid double taxation by adopting some version of the "arm's-length" approach. That course, however, would not by any means guarantee an end to double taxation.

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[26] We have no need to address in this opinion the constitutionality of combined apportionment with respect to state taxation of domestic corporations with foreign parents or foreign corporations with either foreign parents or foreign subsidiaries. See also n. 32, *infra*.

As we have already noted, the "arm's-length" approach is generally based, in the first instance, on a multicorporate enterprise's own formal accounting. But, despite that initial reliance, the "arm's-length" approach recognizes, as much as the formula apportionment approach, that closely related corporations can engage in a transfer of values that is not fully reflected in their formal ledgers. Thus, for example, 26 U. S. C. § 482 provides:

> "In any case of two or more . . . businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary [of the Treasury] may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such . . . businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such . . . businesses."[27]

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[27] Cf. Treasury Department's Model Income Tax Treaty of June 16, 1981, Art. 9, reprinted in CCH Tax Treaties ¶ 158 (1981) (hereinafter Model Treaty) ("Where . . . an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State . . . and . . . conditions are made or imposed between the two enterprises in their commercial or financial relations

And, as one might expect, the United States Internal Revenue Service has developed elaborate regulations in order to give content to this general provision. Many other countries have similar provisions.[28] A serious problem, however, is that even though most nations have adopted the "arm's-length" approach in its general outlines, the precise rules under which they reallocate income among affiliated corporations often differ substantially, and whenever that difference exists, the possibility of double taxation also exists.[29] Thus, even if California were to adopt some version of the "arm's-length" approach, it could not eliminate the risk of double taxation of corporations subject to its franchise tax, and might in some cases end up subjecting those corporations to more serious double taxation than would occur under formula apportionment.[30]

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which differ from those which would be made between independent enterprises, then any profits which, but for those conditions would have accrued to one of the enterprises, but by reason of those conditions have not so accrued, may be included in the profits of that enterprise and taxed accordingly"); J. Bischel, Income Tax Treaties 219 (1978) (hereinafter Bischel).

[28] See generally G. Harley, International Division of the Income Tax Base of Multinational Enterprise 143–160 (1981) (hereinafter Harley); Madere, International Pricing: Allocation Guidelines and Relief from Double Taxation, 10 Tex. Int'l L. J. 108, 111–120 (1975).

[29] See Surrey, Reflections on the Allocation of Income and Expenses Among National Tax Jurisdictions, 10 L. & Policy Int'l Bus. 409 (1978); Bischel 459–461, 464–466; B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders ¶ 15.06 (4th ed. 1979); Harley 143–160.

[30] Another problem arises out of the treatment of intercorporate dividends. Under formula apportionment as practiced by California, intercorporate dividends attributable to the unitary business are, like many other intercorporate transactions, considered essentially irrelevant and are not included in taxable income. See n. 5, *supra*. If the "arm's-length" method were entirely consistent, it would tax intercorporate dividends when they occur, just as all other investment income is taxed. (In which State that dividend could be taxed is not particularly important, since the issue here is international rather than interstate double taxation. See *Mobil*, 445 U. S., at 447–448.) It could also be argued that this would not,

That California would have trouble avoiding double taxation even if it adopted the "arm's-length" approach is, we think, a product of the difference between a tax on income and a tax on tangible property. See *supra*, at 187–188. Allocating income among various taxing jurisdictions bears some resemblance, as we have emphasized throughout this opinion, to slicing a shadow. In the absence of a central coordinating authority, absolute consistency, even among taxing authorities whose basic approach to the task is quite similar, may just be too much to ask.[31] If California's

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strictly speaking, result in double taxation, since the income taxed would be income "of" the parent rather than income "of" the subsidiary. The effect, however, would often be to penalize an enterprise simply because it has adopted a particular corporate structure. In practice, therefore, most jurisdictions allow for tax credits or outright exemptions for intercorporate dividends among closely tied corporations, and provision for such credits or exemptions is often included in tax treaties. See generally Model Treaty, Art. 23; Bischel 2. No suggestion has been made here that appellant's dividends from its subsidiaries would have to be exempt entirely from domestic state taxation. And the grant of a credit, which is the approach taken by federal law, see 26 U. S. C. § 901 *et seq.*, does not in fact entirely eliminate effective double taxation: the same income is still taxed twice, although the credit insures that the total tax is no greater than that which would be paid under the higher of the two tax rates involved. Moreover, once the Federal Government has allowed a credit for foreign taxes on a particular intercorporate dividend, we are not persuaded why, as a logical matter, a State would have to grant another credit of its own, since the federal credit would have already vindicated the goal of not subjecting the taxpayer to a higher tax burden that it would have to bear if its subsidiary's income were not taxed abroad.

[31] At the federal level, double taxation is sometimes mitigated by provisions in tax treaties providing for intergovernmental negotiations to resolve differences in the approaches of the respective taxing authorities. See generally Model Treaty, Art. 25; 2 New York University, Proceedings of the Fortieth Annual Institute on Federal Taxation § 31.03[2] (1982) (hereinafter N. Y. U. Institute). But cf. Owens, United States Income Tax Treaties: Their Role in Relieving Double Taxation, 17 Rutgers L. Rev. 428, 443–444 (1963) (role of such provisions procedural rather than substantive). California, however, is in no position to negotiate with foreign gov-

method of formula apportionment "inevitably" led to double taxation, see *supra*, at 188, that might be reason enough to render it suspect. But since it does not, it would be perverse, simply for the sake of avoiding double taxation, to require California to give up one allocation method that sometimes results in double taxation in favor of another allocation method that also sometimes results in double taxation. Cf. *Moorman Mfg. Co.*, 437 U. S., at 278–280.

It could be argued that even if the Foreign Commerce Clause does not require California to adopt the "arm's-length" approach to foreign subsidiaries of domestic corporations, it does require that whatever system of taxation California adopts must not result in double taxation in any particular case. The implication of such a rule, however, would be that even if California adopted the "arm's-length" method, it would be required to defer, not merely to a single internationally accepted bright-line standard, as was the case in *Japan Line*, but to a variety of § 482-type reallocation decisions made by individual foreign countries in individual cases. Although double taxation is a constitutionally disfavored state of affairs, particularly in the international context, *Japan Line* does not require forbearance so extreme or so one-sided.

C

We come finally to the second inquiry suggested by *Japan Line*—whether California's decision to adopt formula apportionment in the international context was impermissible because it "may impair federal uniformity in an area where federal uniformity is essential," 441 U. S., at 448, and "prevents the Federal Government from 'speaking with one voice' in international trade," *id.*, at 453, quoting *Michelin Tire Corp.*

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ernments, and neither the tax treaties nor federal law provides a mechanism by which the Federal Government could negotiate double taxation arising out of state tax systems. In any event, such negotiations do not always occur, and when they do occur they do not always succeed.

v. *Wages*, 423 U. S. 276, 285 (1976). In conducting this inquiry, however, we must keep in mind that if a state tax merely has foreign resonances, but does not implicate foreign affairs, we cannot infer, "[a]bsent some explicit directive from Congress, . . . that treatment of foreign income at the federal level mandates identical treatment by the States." *Mobil*, 445 U. S., at 448. See also *Japan Line*, 441 U. S., at 456, n. 20; *Michelin Tire Corp.*, *supra*, at 286. Thus, a state tax at variance with federal policy will violate the "one voice" standard if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive. The second of these considerations is, of course, essentially a species of pre-emption analysis.

(1)

The most obvious foreign policy implication of a state tax is the threat it might pose of offending our foreign trading partners and leading them to retaliate against the Nation as a whole. 441 U. S., at 450. In considering this issue, however, we are faced with a distinct problem. This Court has little competence in determining precisely when foreign nations will be offended by particular acts, and even less competence in deciding how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please. The best that we can do, in the absence of explicit action by Congress, is to attempt to develop objective standards that reflect very general observations about the imperatives of international trade and international relations.

This case is not like *Mobil*, in which the real issue came down to a question of interstate rather than foreign commerce. 445 U. S., at 446–449. Nevertheless, three distinct factors, which we have already discussed in one way or another, seem to us to weigh strongly against the conclusion that the tax imposed by California might justifiably lead to significant foreign retaliation. First, the tax here does not create an *automatic* "asymmetry," *Japan Line, supra,* at 453, in international taxation. See *supra,* at 188, 192–193. Second, the tax here was imposed, not on a foreign entity as was the case in *Japan Line,* but on a domestic corporation. Although, California "counts" income arguably attributable to foreign corporations in calculating the taxable income of that domestic corporation, the legal incidence of the tax falls on the domestic corporation.[32] Third, even if foreign nations have a legitimate interest in reducing the tax burden of domestic corporations, the fact remains that appellant is without a doubt amenable to be taxed in California in one way or another, and that the amount of tax it pays is much more the function of California's tax rate than of its allocation method. Although a foreign nation might be more offended by what it considers unorthodox treatment of appellant than it would be if California simply raised its general tax rate to achieve the same economic result, we can only assume that the offense involved in either event would be attenuated at best.

A state tax may, of course, have foreign policy implications other than the threat of retaliation. We note, however, that in this case, unlike *Japan Line,* the Executive Branch has decided not to file an *amicus curiae* brief in opposition to the state tax.[33] The lack of such a submission is by no means dispositive. Nevertheless, when combined with all the other considerations we have discussed, it does suggest that the foreign policy of the United States—whose nuances, we must emphasize again, are much more the province of the Executive Branch and Congress than of this Court—is not seriously threatened by California's decision to apply the unitary business concept and formula apportionment in calculating appellant's taxable income.

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[32] We recognize that the fact that the legal incidence of a tax falls on a corporation whose formal corporate domicile is domestic might be less significant in the case of a domestic corporation that was owned by foreign interests. We need not decide here whether such a case would require us to alter our analysis.

[33] The Solicitor General did submit a memorandum opposing worldwide formula apportionment by a State in *Chicago Bridge & Iron Co.* v. *Caterpillar Tractor Co.,* No. 81–349, a case that was argued last Term, and carried over to this Term. Although there is no need for us to speculate as to the reasons for the Solicitor General's decision not to submit a similar memorandum or brief in this case, cf. Brief for National Governors' Association et al. as *Amici Curiae* 6–7, there has been no indication that the position taken by the Government in *Chicago Bridge & Iron Co.* still represents its views, or that we should regard the brief in that case as applying to this case.

(2)

When we turn to specific indications of congressional intent, appellant's position fares no better. First, there is no claim here that the federal tax statutes themselves provide the necessary pre-emptive force. Second, although the United States is a party to a great number of tax treaties that require the Federal Government to adopt some form of "arm's-length" analysis in taxing the domestic income of multinational enterprises,[34] that requirement is generally waived with respect to the taxes imposed by each of the contracting nations on its own domestic corporations.[35] This fact, if nothing else, confirms our view that such taxation is in reality of local rather than international concern. Third, the tax treaties into which the United States has entered do not generally cover the taxing activities of subnational governmental units such as States,[36] and in none of the treaties does the restriction on "non-arm's-length" methods of taxation apply to the States. Moreover, the Senate has on at least one occasion, in considering a proposed treaty, attached a reservation declining to give its consent to a provision in the treaty that would have extended that restriction to the States.[37] Finally, it remains true, as we said in *Mobil*, that "Congress has long debated, but has not enacted, legislation designed to regulate state taxation of income." 445 U. S., at 448.[38] Thus, whether we apply the "explicit directive" standard articulated in *Mobil*, or some more relaxed standard which takes into account our residual concern about the foreign policy implications of California's tax, we cannot conclude that the California tax at issue here is pre-empted by federal law or fatally inconsistent with federal policy.

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[34] See generally Model Treaty, Art. 7(2); Bischel 33–38, 459–461.

[35] See Model Treaty, Art. 1(3); Bischel 718; N. Y. U. Institute § 31.04[3].

[36] See Bischel 7.

[37] See 124 Cong. Rec. 18400, 19076 (1978).

VI

The judgment of the California Court of Appeal is

Affirmed.

JUSTICE STEVENS took no part in the consideration or decision of this case.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

The Court's opinion addresses the several questions presented in this case with commendable thoroughness. In my view, however, the California tax clearly violates the Foreign Commerce Clause—just as did the tax in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434 (1979). I therefore do not consider whether appellant and its foreign subsidiaries constitute a "unitary business" or whether the State's apportionment formula is fair.

With respect to the Foreign Commerce Clause issue, the Court candidly concedes: (i) "double taxation is a constitutionally disfavored state of affairs, particularly in the international context," *ante*, at 193; (ii) "like the tax imposed in *Japan Line*, [California's tax] has resulted in actual double taxation," *ante*, at 187; and therefore (iii) this tax "deserves to receive close scrutiny," *ante*, at 189. The Court also concedes that "[t]his case is similar to *Japan Line* in a number of important respects," *ante*, at 187, and that the Federal Government "seems to prefer the ['arm's-length'] taxing method adopted by the international community," *ibid.* The Court identifies several distinctions between this case and *Japan Line*, however, and sustains the validity of the California tax despite the inevitable double taxation and the incompatibility with the method of taxation accepted by the international community.

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[38] There is now pending one such bill of which we are aware. See H. R. 2918, 98th Cong., 1st Sess. (1983).

In reaching its result, the Court fails to apply "close scrutiny" in a manner that meets the requirements of that exacting standard of review. Although the facts of *Japan Line* differ in some respects, they are identical on the critical questions of double taxation and federal uniformity. The principles enunciated in that case should be controlling here: a state tax is unconstitutional if it either "creates a substantial risk of international multiple taxation" or "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" 441 U. S., at 451.

I

It is undisputed that the California tax not only "creates a substantial risk of international multiple taxation," but also "has resulted in actual double taxation" in this case. See *ante*, at 187. As the Court explains, this double taxation occurs because California has adopted a taxing system that "serious[ly] diverge[s]" from the internationally accepted taxing methods adopted by foreign taxing authorities. *Ibid.* The Court nevertheless upholds the tax on the ground that California would not necessarily reduce double taxation by conforming to the accepted international practice.[1] *Ante*, at

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[1] The Court also appears to attach some weight to its view that California is unable "simply [to] adher[e] to one bright-line rule" to eliminate double taxation. See *ante*, at 189. From California's perspective, however, a

190–193. This argument fails to recognize the fundamental difference between the current double taxation and the risk that would remain under an "arm's-length" system. I conclude that the California tax violates the first principle enunciated in *Japan Line*.

At present, double taxation exists because California uses an allocation method that is different in its basic assumptions from the method used by all of the countries in which appellant's subsidiaries operate. The State's formula has no necessary relationship to the amount of income earned in a given jurisdiction as calculated under the "arm's-length" method. On the contrary, the formula allocates a higher proportion of income to jurisdictions where wage rates, property values, and sales prices are higher. See J. Hellerstein & W. Hellerstein, State and Local Taxation 538–539 (4th ed. 1978). To the extent that California is such a jurisdiction, the formula inherently leads to double taxation.

Appellant's case is a good illustration of the problem. The overwhelming majority of its overseas income is earned by its Latin American subsidiaries. See App. 112. Since wage rates, property values, and sales prices are much lower in Latin America than they are in California, the State's apportionment formula systematically allocates a much lower proportion of this income to Latin America than does the internationally accepted "arm's-length" method.[2] Correspond-

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bright-line rule that avoids Foreign Commerce Clause problems clearly exists. The State simply could base its apportionment calculations on appellant's United States income as reported on its federal return. This sum is calculated by the "arm's-length" method, and is thus consistent with international practice and federal policy. Double taxation is avoided to the extent possible by international negotiation conducted by the Federal Government. California need not concern itself with the details of the international allocation, but could apportion the American income using its three-factor formula.

[2] Although there are a few foreign countries where wage rates, property values, and sales prices are higher than they are in California, appellant's principal subsidiaries did not operate in such countries.

ingly, the formula allocates a higher proportion of the income to California, where it is subject to state tax. As long as the three factors remain higher in California, it is inevitable that the State will tax income under its formula that already has been taxed by another country under accepted international practice.

In the tax years in question, for example, over 27% of appellant's worldwide income was earned in Latin America and taxed by Latin American countries under the "arm's-length" method. See *ibid.* Latin American wages, however, represented under 6% of the worldwide total; Latin American property was about 20% of the worldwide total; and Latin American sales were less than 14% of the worldwide total. See *id.*, at 109–111. As a result, roughly 13% of appellant's worldwide income—less than half of the "arm's-length" total—was allocated to Latin America under California's formula. In other words, over half of the income of appellant's largest group of subsidiaries was allocated elsewhere under the State's formula. In accordance with international practice, all of this income had been taxed in Latin America, but the California system would allow the income to be taxed a second time in California and other jurisdictions. This problem of double taxation cannot be eliminated without either California or the international community changing its basic tax practices.

If California adopted the "arm's-length" method, double taxation could still exist through differences in application.[3] California and Colombia, for example, might apply different accounting principles to a given intracorporate transfer. But these types of differences, although presently tolerated under international practice, are not inherent in the "arm's-length" system. Moreover, there is no reason to suppose that they will consistently favor one jurisdiction over another. And as international practice becomes more refined, such differences are more likely to be resolved and double taxation eliminated.

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[3] Similarly, there could be double taxation if the entire international community adopted California's method of formula apportionment. Different jurisdictions might apply different accounting principles to determine wages, property values, and sales. Indeed, any system that calls for the exercise of any judgment leaves the possibility for some double taxation.

In sum, the risk of double taxation can arise in two ways. Under the present system, it arises because California has rejected accepted international practice in favor of a tax structure that is fundamentally different in its basic assumptions. Under a uniform system, double taxation also could arise because different jurisdictions—despite their agreement on basic principles—may differ in their application of the system. But these two risks are fundamentally different. Under the former, double taxation is inevitable. It cannot be avoided without changing the system itself. Under the latter, any double taxation that exists is the result of disagreements in application. Such disagreements may be unavoidable in view of the need to make individual judgments, but problems of this kind are more likely to be resolved by international negotiation.

On its face, the present double taxation violates the Foreign Commerce Clause. I would not reject, as the Court does, the solution to this constitutional violation simply because an international system based on the principle of uniformity would not necessarily be uniform in all of the details of its operation.

II

The Court acknowledges that its decision is contrary to the Federal Government's "prefer[ence for] the taxing method adopted by the international community." *Ante*, at 187. It also states the appropriate standard for assessing the State's rejection of this preference: "a state tax at variance with federal policy will violate the 'one voice' standard if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive." *Ante*, at 194 (emphasis in original). The Court concludes, however, that the California tax does not prevent the Federal

Government from speaking with one voice because it perceives relevant factual distinctions between this case and *Japan Line*. I conclude that the California taxing plan violates the second principle enunciated in *Japan Line*, despite these factual distinctions, because it seriously "implicates foreign policy issues which must be left to the Federal Government."

The Court first contends that "the tax here does not create an *automatic* 'asymmetry.'" *Ante*, at 194–195 (emphasis in original) (quoting *Japan Line*, 441 U. S., at 453). This seems to mean only that the California tax does not result in double taxation in every case. But the fundamental inconsistency between the two methods of apportionment means that double taxation is inevitable. Since California is a jurisdiction where wage rates, property values, and sales prices are relatively high, double taxation is the logical expectation in a large proportion of the cases. Moreover, we recognized in *Japan Line* that "[e]ven a slight overlapping of tax—a problem that might be deemed *de minimis* in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned." *Id.*, at 456.

The Court also relies on the fact that the taxpayer here technically is a domestic corporation. See *ante*, at 195. I have several problems with this argument. Although appellant may be the taxpayer in a technical sense, it is unquestioned that California is taxing the income of the foreign subsidiaries. Even if foreign governments are indifferent about the overall tax burden of an American corporation, they have legitimate grounds to complain when a heavier tax is calculated on the basis of the income of corporations domiciled in their countries. If nothing else, such a tax has the effect of discouraging American investment in their countries.

The Court's argument is even more difficult to accept when one considers the dilemma it creates for cases involving foreign corporations. If California attempts to tax the American subsidiary of an overseas company on the basis of the parent's worldwide income, with the result that double taxation occurs, I see no acceptable solution to the problem created. Most of the Court's analysis is inapplicable to such a case. There can be little doubt that the parent's government would be offended by the State's action and that international disputes, or even retaliation against American corporations, might be expected.[4] It thus seems inevitable that the tax would have to be found unconstitutional—at least to the extent it is applied to foreign companies. But in my view, invalidating the tax only to this limited extent also would be unacceptable. It would leave California free to discriminate against a Delaware corporation in favor of an overseas corporation. I would not permit such discrimination[5] without explicit congressional authorization.

The Court further suggests that California could impose the same tax burden on appellant under the "arm's-length" system simply by raising the general tax rate. See *ante*, at 195. Although this may be true in theory, the argument ignores the political restraints that make such a course infeasible. If appellant's tax rate were increased, the State would be forced to raise the rate for all corporations.[6] If California wishes to follow this course, I see no constitutional objection. But it must be accomplished through the political process in which corporations doing business in California are free to voice their objections.

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[4] This is well illustrated by the protests that the Federal Government already has received from our principal trading partners. Several of these are reprinted or discussed in the papers now before the Court. See, *e. g.*, App. to Brief for Committee on Unitary Tax as *Amicus Curiae* 7 (Canada); *id.*, at 9 (France); *id.*, at 13–16 (United Kingdom); *id.*, at 17–19 (European Economic Community); App. to Brief for International Bankers Association in California et al. as *Amici Curiae* in *Chicago Bridge & Iron Co.* v. *Caterpillar Tractor Co.*, O. T. 1982, No. 81–349, pp. 4–5 (Japan); Memorandum for United States as *Amicus Curiae* in *Chicago Bridge & Iron Co.* v. *Caterpillar Tractor Co.*, O. T. 1982, No. 81–349, p. 3 ("[A] number of foreign governments have complained—both officially and unofficially—that the apportioned combined method . . . creates an irritant in their commercial relations with the United States. Retaliatory taxation may ensue . . ."); App. to *id.*, at 2a–3a (United Kingdom); *id.*, at 8a–9a (Canada).

[5] California is, of course, free to tax its own corporations more heavily than it taxes out-of-state corporations.

Finally, the Court attaches some weight to the fact that "the Executive Branch has decided not to file an *amicus curiae* brief in opposition to the state tax." *Ibid.* The Court, in a footnote, dismisses the Solicitor General's memorandum in *Chicago Bridge & Iron Co.* v. *Caterpillar Tractor Co.*, No. 81–349, despite the fact that it is directly on point and the case is currently pending before the Court. See *ante*, at 195, n. 33. In this memorandum, the Solicitor General makes it clear beyond question what the Executive Branch believes: "imposition of [a state tax] on the apportioned combined worldwide business income of a unitary group of related corporations, including foreign corporations, impairs federal uniformity in an area where such uniformity is essential."[7] Memorandum for United States as *Amicus Curiae* in *Chicago Bridge & Iron Co.* v. *Caterpillar Tractor Co.*, O. T. 1982, No. 81–349, p. 2. I recognize that the Government may change its position from time to time, but I see no reason to ignore its view in one case currently pending before the Court when considering another case that raises exactly the same issue. The Solicitor General has not withdrawn his memorandum, nor has he supplemented it with anything taking a contrary position. As long as *Chicago Bridge & Iron* remains before us, we must conclude that the Government's views are accurately reflected in the Solicitor General's memorandum in that pending case.

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[6] The State could not raise the tax rate for appellant alone, or even for corporations engaged in foreign commerce, without facing constitutional challenges under the Equal Protection or the Commerce Clause.

[7] *Chicago Bridge & Iron*, it might be noted, is a case in which the state tax is imposed on an American parent corporation.

In sum, none of the distinctions on which the Court relies is convincing. California imposes a tax that is flatly inconsistent with federal policy. It prevents the Federal Government from speaking with one voice in a field that should be left to the Federal Government.[8] This is an intrusion on national policy in foreign affairs that is not permitted by the Constitution.

III

In *Japan Line* we identified two constraints that a state tax on an international business must satisfy to comply with the Foreign Commerce Clause. We explicitly declared that "[i]f a state tax contravenes either of these precepts, it is unconstitutional." 441 U. S., at 451. In my view, the California tax before us today violates *both* requirements. I would declare it unconstitutional.

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[8] The Court relies on the absence of a "clear federal directive." See *ante*, at 194, 196–197. In light of the Government's position, as stated in the Solicitor General's memorandum, see *supra*, at 204, the absence of a more formal statement of its view is entitled to little weight.

UNITED STATES *v.* MITCHELL ET AL.

CERTIORARI TO THE COURT OF CLAIMS

No. 81-1748. Argued March 1, 1983—Decided June 27, 1983

Respondents—individuals owning interests in allotted lands on the Quinault Indian Reservation, an unincorporated association of such allottees, and the Quinault Tribe—filed actions in the Court of Claims seeking to recover damages from the United States for alleged mismanagement of timberlands in the reservation, and asserting that such mismanagement constituted a breach of the fiduciary duty owed respondents by the United States as trustee under various federal statutes and regulations. The court ultimately held the United States subject to suit for money damages on most of respondents' claims, ruling that the federal timber management statutes, various other federal statutes governing roadbuilding, rights-of-way, Indian funds, and Government fees, and the regulations promulgated under these statutes imposed fiduciary duties upon the United States in its management of forested allotted lands.

Held: The United States is accountable in money damages for alleged breaches of trust in connection with its management of forest resources on allotted lands of the Quinault Reservation. Pp. 211–228.

(a) The Tucker Act provides the United States' consent to suit for claims founded upon statutes or regulations that expressly or implicitly create substantive rights to money damages. Pp. 211–219.

(b) In contrast to the bare trust created by the General Allotment Act, *United States* v. *Mitchell*, 445 U. S. 535, the statutes and regulations upon which respondents have based their money claims clearly give the Federal Government full responsibility to manage Indian resources and land for the Indians' benefit. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities. Moreover, a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). Because the statutes and regulations at issue clearly establish a fiduciary obligation of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Government for damages sustained. Given the existence of a trust relationship, it follows that the Government should be liable in damages for the breach of its fiduciary duties. A damages remedy also furthers the purposes of the statutes and regulations, which clearly require the Secretary of the Interior to manage Indian resources so as to generate proceeds for the Indians. Prospective equitable remedies—declaratory, injunctive, or mandamus relief—in the context of this case would be totally inadequate. Pp. 219–228.

229 Ct. Cl. 1, 664 F. 2d 265, affirmed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 228.

Joshua I. Schwartz argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Dinkins*, *Deputy Solicitor General Claiborne*, and *Thomas H. Pacheco*.

Charles A. Hobbs argued the cause for respondents. With him on the brief was *Jerry C. Straus*.*

JUSTICE MARSHALL delivered the opinion of the Court.

The principal question in this case is whether the United States is accountable in money damages for alleged breaches of trust in connection with its management of forest resources on allotted lands of the Quinault Indian Reservation.

I

A

In the 1850's, the United States undertook a policy of removing Indian tribes from large areas of the Pacific Northwest in order to facilitate the settlement of non-Indians.[1]

**Reid Peyton Chambers*, *Harry R. Sachse*, *Kenneth J. Guido, Jr.*, *Donald J. Simon*, *Richard W. Hughes*, *George Forman*, *David Rapport*, *Robert J. Nordhaus*, *George E. Fettinger*, and *Steven L. Bunch* filed a brief for the Shoshone Tribe of the Wind River Indian Reservation et al. as *amici curiae* urging affirmance.

[1] See Act of June 5, 1850, 9 Stat. 437; Appropriation Act of Mar. 3, 1853, 10 Stat. 226, 238; *Quinault Allottee Assn.* v. *United States*, 202 Ct. Cl. 6[illegible], 628–269, 485 F. 2d 1391, 1392 (1973), cert. denied, 416 U. S. 961 (1974).

Pursuant to this policy, the first Governor and Superintendent of Indian Affairs of the Washington Territory began negotiations in 1855 with various tribes living on the west coast of the Territory. The negotiations culminated in a treaty between the United States and the Quinault and Quileute Tribes, 12 Stat. 971 (Treaty of Olympia). In the Treaty the Indians ceded to the United States a vast tract of land on the Olympic Peninsula in the State of Washington, and the United States agreed to set aside a reservation for the Indians.

In 1861 a reservation of about 10,000 acres was provisionally chosen for the tribes.[2] This tract proved undesirable because of its limited size and heavy forestation. The Quinault Agency superintendent subsequently recommended that since the coastal tribes drew their subsistence almost entirely from the water,[3] they should be collected on a reservation suitable for their fishing needs. Acting on this suggestion, President Grant issued an Executive Order on November 4, 1873, designating about 200,000 acres along the Washington coast as an Indian reservation.[4] The vast bulk of this land consisted of rain forest covered with huge, coniferous trees.

In 1905 the Federal Government began to allot the Quinault Reservation in trust to individual Indians under the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U. S. C. § 331 *et seq.*[5] See also the Quinault Allotment Act of Mar. 4, 1911, ch. 246, 36 Stat. 1345. The Government initially determined that the forested areas of the Reservation were not to be allotted because they were not suitable for agriculture or grazing. In 1924, however, this Court concluded that the character of lands to be set apart for the Indians was not restricted by the General Allotment Act. *United States* v. *Payne*, 264 U. S. 446, 449. Thereafter, the forested lands of the Reservation were allotted. By 1935 the entire Reservation had been divided into 2,340 trust allotments, most of which were 80 acres of heavily timbered land. About a third of the Reservation has since gone out of trust, but the bulk of the land has remained in trust status.[6]

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[2] See *Halbert* v. *United States*, 283 U. S. 753, 757 (1931).

[3] See generally *United States* v. *Washington*, 384 F. Supp. 312, 350–353 (WD Wash. 1974) (describing pretreaty role of fishing among Northwest Indians), aff'd, 520 F. 2d 676 (CA9 1975), cert. denied, 423 U. S. 1086 (1976).

[4] I C. Kappler, Indian Affairs 923 (2d ed. 1904). The Order declared that the reservation would be held for the use of the Quinault, Quileute, Hoh, Queets, "and other tribes of fish-eating Indians on the Pacific Coast." *Ibid.*

[5] Section 5 of the Act provided that the United States would hold the allotted land for 25 years "in trust for the sole use and benefit of the Indian to whom such allotment shall have been made." The period during which

The forest resources on the allotted lands have long been managed by the Department of the Interior, which exercises "comprehensive" control over the harvesting of Indian timber. *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 145 (1980). The Secretary of the Interior has broad statutory authority over the sale of timber on reservations. See 25 U. S. C. §§406, 407. Sales of timber "shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs," §406(a), and the proceeds from such sales are to be used for the benefit of the Indians or transferred to the Indian owner, §§406(a), 407. Congress has directed the Secretary to adhere to principles of sustained-yield forestry on all Indian forest lands under his supervision. 25 U. S. C. §466. Under these statutes, the Secretary has promulgated detailed regulations governing the management of Indian timber. 25 CFR pt. 163 (1983). The Secretary is authorized to deduct an administrative fee for his services from the timber revenues paid to Indian allottees. 25 U. S. C. §§406(a), 413.

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the United States was to hold the allotted land was extended indefinitely by the Indian Reorganization Act of 1934, §2, 48 Stat. 984, 25 U. S. C. §462.

[6] See *Mitchell* v. *United States*, 219 Ct. Cl. 95, 97, 591 F. 2d 1300, 1300–1301 (1979) (en banc).

B

The respondents are 1,465 individuals owning interests in allotments on the Quinault Reservation, an unincorporated association of Quinault Reservation allottees, and the Quinault Tribe, which now holds some portions of the allotted lands. In 1971 respondents filed four actions that were consolidated in the Court of Claims. Jurisdiction was based on 28 U. S. C. §§ 1491 and 1505. Respondents sought to recover damages from the United States based on allegations of pervasive waste and mismanagement of timberlands on the Quinault Reservation. More specifically, respondents claimed that the Government (1) failed to obtain a fair market value for timber sold; (2) failed to manage timber on a sustained-yield basis; (3) failed to obtain any payment at all for some merchantable timber; (4) failed to develop a proper system of roads and easements for timber operations and exacted improper charges from allottees for maintenance of roads; (5) failed to pay any interest on certain funds from timber sales held by the Government and paid insufficient interest on other funds; and (6) exacted excessive administrative fees from allottees. Respondents assert that the alleged misconduct constitutes a breach of the fiduciary duty owed them by the United States as trustee under various statutes.

Six years after the suits were filed, the United States moved to dismiss for lack of jurisdiction, contending that the Court of Claims had no authority over claims based on a breach of trust. The court denied the motion, holding that the General Allotment Act created a fiduciary duty on the United States' part to manage the timber resources properly and thereby provided the necessary authority for recovery of damages against the United States. *Mitchell* v. *United States*, 219 Ct. Cl. 95, 591 F. 2d 1300 (1979) (en banc).

In *United States* v. *Mitchell*, 445 U. S. 535 (1980), this Court reversed the ruling of the Court of Claims, stating that the General Allotment Act "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources." *Id.*, at 542. We concluded that "[a]ny right of the respondents to recover money damages for Government mismanagement of timber resources must be found in some source other than [the General Allotment] Act." *Id.*, at 546. Since the Court of Claims had not considered respondents' assertion that other statutes render the United States answerable in money damages for the alleged mismanagement in this case, we remanded the case for consideration of these alternative grounds for liability. See *id.*, at 546, n. 7.

On remand, the Court of Claims once again held the United States subject to suit for money damages on most of respondents' claims. 229 Ct. Cl. 1, 664 F. 2d 265 (1981) (en banc). The court ruled that the timber management statutes, 25 U. S. C. §§406, 407, and 466, various federal statutes governing roadbuilding and rights of way, §§318 and 323–325, statutes governing Indian funds and Government fees, §§162a and 413, and regulations promulgated under these statutes imposed fiduciary duties upon the United States in its management of forested allotted lands. The court concluded that the statutes and regulations implicitly required compensation for damages sustained as a result of the Government's breach of its duties. Thus, the court held that respondents could proceed on their claims.

Because the decision of the Court of Claims raises issues of substantial importance concerning the liability of the United States,[7] we granted the Government's petition for certiorari. 457 U. S. 1104 (1982). We affirm.

II

Respondents have invoked the jurisdiction of the Court of Claims under the Tucker Act, 28 U. S. C. §1491, and its counterpart for claims brought by Indian tribes, 28 U. S. C.

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[7] The Government has informed us that the damages claimed in this suit alone may amount to $100 million. Pet. for Cert. 24.

§ 1505, known as the Indian Tucker Act.[8] The Tucker Act states in pertinent part:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.[9] The terminology employed in some of our prior decisions has unfortunately generated some confusion as to whether the Tucker Act constitutes a waiver of sovereign immunity. The time has come to resolve this confusion. For the reasons set forth below, we conclude that by giving the Court of Claims jurisdiction over specified types of claims against the United States,[10] the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims.

A

Before 1855 no general statute gave the consent of the United States to suit on claims for money damages; the only recourse available to private claimants was to petition Congress for relief.[11] In order to relieve the pressure caused by the volume of private bills and to avoid the delays and inequities of the private bill procedure, Congress created the Court of Claims. Act of Feb. 24, 1855, 10 Stat. 612. The 1855 Act empowered that court to hear claims and report its findings to Congress and to submit a draft of a private bill in each case which received a favorable decision. §7, 10 Stat. 613. The limited powers initially conferred upon the court failed to relieve Congress from "the laborious necessity of examining the merits of private bills." *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 553 (1962) (opinion of Harlan, J.). Thus, in his State of the Union Message of 1861, President Lincoln recommended that the court be authorized to render final judgments. He declared that it is "as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals." Cong. Globe, 37th Cong., 2d Sess., App. 2 (1861). Congress adopted President Lincoln's recommendation and made the court's judgments final. Act of Mar. 3, 1863, 12 Stat. 765.[12]

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[8] Section 24 of the Indian Claims Commission Act, 28 U. S. C. § 1505, provides tribal claimants the same access to the Court of Claims provided to individual claimants by 28 U. S. C. § 1491. See *United States* v. *Mitchell*, 445 U. S. 535, 538–540 (1980).

[9] See *United States* v. *Sherwood*, 312 U. S. 584, 586 (1941); 14 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3654, pp. 156–157 (1976).

[10] The Tucker Act provided concurrent jurisdiction in the district courts over claims not exceeding $10,000. See 28 U. S. C. § 1346(a)(2).

[11] See P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 98 (2d ed. 1973); Richardson, History, Jurisdiction, and Practice of the Court of Claims, 17 Ct. Cl. 3, 3–4 (1882).

In 1886 Representative John Randolph Tucker introduced a bill to revise in several respects the jurisdiction and procedures of the Court of Claims and to replace most provisions of the 1855 and 1863 Acts. H. R. 6974, 49th Cong., 1st Sess. (1886). The House Judiciary Committee reported that the bill was a "comprehensive measure by which claims against the United States may be heard and determined." H. R. Rep. No. 1077, 49th Cong., 1st Sess., 1 (1886). The measure was designed to "give the people of the United States what every civilized nation of the world has already done—the right to go into the courts to seek redress against the Government for their grievances." 18 Cong. Rec. 2680 (1887) (remarks of Rep. Bayne). See *id.*, at 622 (remarks of Rep. Tucker); *id.*, at 2679 (colloquy between Reps. Tucker and Townshend); *id.*, at 2680 (remarks of Rep. Holman). The eventual enactment thus "provide[d] for the bringing of suits against the Government of the United States." Act of Mar. 3, 1887, 24 Stat. 505.

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[12] Section 14 of the 1863 Act provided that "no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury." 12 Stat. 768. In *Gordon* v. *United States*, 2 Wall. 561 (1865), this Court dismissed an appeal from a judgment of the Court of Claims for want of jurisdiction, holding that § 14 gave the Secretary a revisory authority over the court inconsistent with its exercise of judicial power. Congress promptly repealed the provision, Act of Mar. 17, 1866, ch. 19, § 1, 14 Stat. 9. See *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 554 (1962) (opinion of Harlan, J.).

The Indian Tucker Act, 28 U. S. C. § 1505, has a similar history. An early amendment to the original enactment creating the Court of Claims had excluded claims by Indian tribes. Act of Mar. 3, 1863, § 9, 12 Stat. 767. As a result, Congress eventually confronted a "vast and growing burden" resulting from the large number of tribes seeking special jurisdictional Acts. H. R. Rep. No. 1466, 79th Cong., 1st Sess., 6 (1945). Congress responded by conferring jurisdiction on the Court of Claims to hear any tribal claim "of a character which would be cognizable in the Court of Claims if the claimant were not an Indian tribe." *Id.*, at 13. As the House sponsor of the Act stated, an important goal of the Act was to ensure that it would "never again be necessary to pass special Indian jurisdictional acts in order to permit the Indians to secure a court adjudication on any misappropriations of Indian funds or of any other Indian property by Federal officials that might occur in the future." 92 Cong. Rec. 5313 (1946) (statement of Rep. Jackson). Indians were to be given "their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal government assumed." *Id.*, at 5312.[13] The House

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[13] See 92 Cong. Rec. 5312 (1946) (statement of Rep. Jackson) ("The Interior Department itself has suggested that it ought not be in a position where its employees can mishandle funds and lands of a national trusteeship without complete accountability"). See also Hearings on H. R. 1198 and H. R. 1341 before the House Committee on Indian Affairs, 79th Cong., 1st Sess., 130 (1945) (statement of Assistant Solicitor Cohen).

Report stressed the same point: "If we fail to meet these obligations by denying access to the courts when trust funds have been improperly dissipated or other fiduciary duties have been violated, we compromise the national honor of the United States." H. R. Rep. No. 1466, *supra*, at 5.

For decades this Court consistently interpreted the Tucker Act as having provided the consent of the United States to be sued *eo nomine* for the classes of claims described in the Act. See, *e. g.*, *Schillinger* v. *United States*, 155 U. S. 163, 166–167 (1894); *Belknap* v. *Schild*, 161 U. S. 10, 17 (1896); *Dooley* v. *United States*, 182 U. S. 222, 227–228 (1901); *Reid* v. *United States*, 211 U. S. 529, 538 (1909); *United States* v. *Sherwood*, 312 U. S. 584, 590 (1941); *Dalehite* v. *United States*, 346 U. S. 15, 25, n. 10 (1953); *Soriano* v. *United States*, 352 U. S. 270, 273 (1957). In at least two recent decisions this Court explicitly stated that the Tucker Act effects a waiver of sovereign immunity. *Army & Air Force Exchange Service* v. *Sheehan*, 456 U. S. 728, 734 (1982); *Hatzlachh Supply Co.* v. *United States*, 444 U. S. 460, 466 (1980) *(per curiam)*. These decisions confirm the unambiguous thrust of the history of the Act.

The existence of a waiver is readily apparent in claims founded upon "any express or implied contract with the United States." 28 U. S. C. § 1491. The Court of Claims' jurisdiction over contract claims against the Government has long been recognized, and Government liability in contract is viewed as perhaps "the widest and most unequivocal waiver of federal immunity from suit." Developments in the Law—Remedies Against the United States and Its Officials, 70 Harv. L. Rev. 827, 876 (1957). See also 14 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3656, p. 202 (1976). The source of consent for such suits unmistakably lies in the Tucker Act. Otherwise, it is doubtful that *any* consent would exist, for no contracting officer or other official is empowered to consent to suit against the United

States.[14] The same is true for claims founded upon executive regulations. Indeed, the Act makes absolutely no distinction between claims founded upon contracts and claims founded upon other specified sources of law.

In *United States* v. *Testan*, 424 U. S. 392, 398, 400 (1976), and in *United States* v. *Mitchell*, 445 U. S., at 538, this Court employed language suggesting that the Tucker Act does not effect a waiver of sovereign immunity. Such language was not necessary to the decision in either case. See *infra*, at 217–218. Without in any way questioning the result in either case, we conclude that this isolated language should be disregarded. If a claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit.

B

It nonetheless remains true that the Tucker Act "'does not create any substantive right enforceable against the United States for money damages.'" *United States* v. *Mitchell*, *supra*, at 538, quoting *United States* v. *Testan*, *supra*, at 398. A substantive right must be found in some other source of law, such as "the Constitution, or any Act of Congress, or any regulation of an executive department." 28 U. S. C. § 1491. Not every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act. The claim must be one for money damages against the United States, see *United States* v. *King*, 395 U. S. 1, 2–3 (1969),[15] and the claimant must demonstrate that the source of substantive law he relies upon "'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *United States* v. *Testan*, *supra*, at 400, quoting *Eastport S.S. Corp.* v. *United States*, 178 Ct. Cl. 599, 607, 372 F. 2d 1002, 1009 (1967).[16]

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[14] See *United States* v. *N. Y. Rayon Importing Co.*, 329 U. S. 654, 660 (1947); *United States* v. *Shaw*, 309 U. S. 495, 501 (1940); *Carr* v. *United States*, 98 U. S. 433, 438 (1879).

[15] The Court of Claims also has limited authority to issue declaratory judgments. See 28 U. S. C. § 1507 (actions under § 7428 of the Internal Revenue Code of 1954); *Austin* v. *United States*, 206 Ct. Cl. 719, 723 (declaratory judgments "tied and subordinate to a monetary award"), cert. denied, 423 U. S. 911 (1975).

For example, in *United States* v. *Testan*, *supra*, two Government attorneys contended that they were entitled to a higher salary grade under the Classification Act,[17] and to an award of backpay under the Back Pay Act[18] for the period during which they were classified at a lower grade. This Court concluded that neither the Classification Act nor the Back Pay Act could fairly be interpreted as requiring compensation for wrongful classifications. See 424 U. S., at 398–407. Particularly in light of the "established rule that one is not entitled to the benefit of a position until he has been duly appointed to it," *id.*, at 402, the Classification Act does not support a claim for money damages. While the Back Pay Act does provide a basis for money damages as a remedy "in carefully limited circumstances" such as wrongful reductions in grade, *id.*, at 404, it does not apply to wrongful classifications. *Id.*, at 405.

Similarly, in *United States* v. *Mitchell*, *supra*, this Court concluded that the General Allotment Act does not confer a right to recover money damages against the United States. While § 5 of the Act provided that the United States would hold land "in trust" for Indian allottees, 25 U. S. C. § 348, we held that the Act creates only a limited trust relationship. 445 U. S., at 542. The trust language of the Act does not impose any fiduciary management duties or render the United States answerable for breach thereof, but only prevents improvident alienation of the allotted lands and assures their immunity from state taxation. *Id.*, at 544.

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[16] As the *Eastport* decision recognized, the substantive source of law may grant the claimant a right to recover damages either "expressly or by implication." 178 Ct. Cl., at 605, 372 F. 2d, at 1007. See also *Ralston Steel Corp.* v. *United States*, 169 Ct. Cl. 119, 125, 340 F. 2d 663, 667, cert. denied, 381 U. S. 950 (1965).

[17] 5 U. S. C. § 5101.

[18] 5 U. S. C. § 5596.

Thus, for claims against the United States "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department," 28 U. S. C. § 1491, a court must inquire whether the source of substantive law can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained. In undertaking this inquiry, a court need not find a separate waiver of sovereign immunity in the substantive provision, just as a court need not find consent to suit in "any express or implied contract with the United States." *Ibid.* The Tucker Act itself provides the necessary consent.

Of course, in determining the general scope of the Tucker Act, this Court has not lightly inferred the United States' consent to suit. See *United States* v. *King*, *supra*, at 4–5 (Court of Claims lacks general authority to issue declaratory judgment); *Soriano* v. *United States*, 352 U. S., at 276 (nontolling of limitations beyond statutory provisions). For example, although the Tucker Act refers to claims founded upon any implied contract with the United States, we have held that the Act does not reach claims based on contracts implied in law, as opposed to those implied in fact. *Merritt* v. *United States*, 267 U. S. 338, 341 (1925).

In this case, however, there is simply no question that the Tucker Act provides the United States' consent to suit for claims founded upon statutes or regulations that create substantive rights to money damages. If a claim falls within this category, the existence of a waiver of sovereign immunity is clear. The question in this case is thus analytically distinct: whether the statutes or regulations at issue can be interpreted as requiring compensation. Because the Tucker Act supplies a waiver of immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity. See *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, 32 (1915). "'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'" *United States* v. *Aetna Casualty & Surety Co.*, 338 U. S. 366, 383 (1949), quoting *Anderson* v. *John L. Hayes Construction Co.*, 243 N. Y. 140, 147, 153 N. E. 28, 29–30 (1926) (Cardozo, J.).[19]

III

Respondents have based their money claims against the United States on various Acts of Congress and executive department regulations. We begin by describing these sources of substantive law. We then examine whether they can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they impose.

A

The Secretary of the Interior's pervasive role in the sales of timber from Indian lands began with the Act of June 25, 1910, §§ 7, 8, 36 Stat. 857, as amended, 25 U. S. C. §§ 406, 407. Prior to that time, Indians had no right to sell timber on reservation land,[20] and there existed "'no general law under which authority for the sale of timber on Indian lands, whether allotted or unallotted, can be granted.'" H. R. Rep. No. 1135, 61st Cong., 2d Sess., 3 (1910) (quoting letter of the Secretary of the Interior). Congress recognized that this situation was undesirable "'because in many instances the timber is the only valuable part of the allotment or is the only source from which funds can be obtained for the support of the Indian or the improvement of his allotment.'" *Ibid.* The 1910 Act empowered the Secretary to sell timber on unallotted lands and apply the proceeds of the sales for the benefit of the Indians, § 7, and authorized the Secretary to consent to sales by allottees, with the proceeds to be paid to the allottees or disposed of for their benefit, § 8. Congress thus sought to provide for harvesting timber "in such a manner as to conserve the interests of the people on the reservations, namely, the Indians." 45 Cong. Rec. 6087 (1910) (remarks of Rep. Saunders).

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[19] Cf. *Block* v. *Neal*, 460 U. S. 289, 298 (1983); *Indian Towing Co.* v. *United States*, 350 U. S. 61, 69 (1955).

[20] See *United States* v. *Cook*, 19 Wall. 591 (1874); *Pine River Logging Co.* v. *United States*, 186 U. S. 279 (1902); 19 Op. Atty. Gen. 194 (1888).

From the outset, the Interior Department recognized its obligation to supervise the cutting of Indian timber. In 1911, the Department's Office of Indian Affairs promulgated detailed regulations covering its responsibilities in "managing the Indian forests so as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests." U. S. Office of Indian Affairs, Regulations and Instructions for Officers in Charge of Forests on Indian Reservations 4 (1911). The regulations addressed virtually every aspect of forest management, including the size of sales, contract procedures, advertisements and methods of billing, deposits and bonding requirements, administrative fee deductions, procedures for sales by minors, allowable heights of stumps, tree marking and scaling rules, base and top diameters of trees for cutting, and the percentage of trees to be left as a seed source. *Id.*, at 8–28. The regulations applied to allotted as well as tribal lands, and the Secretary's approval of timber sales on allotted lands was explicitly conditioned upon compliance with the regulations. *Id.*, at 9.

Over time, deficiencies in the Interior Department's performance of its responsibilities became apparent. Accordingly, as part of the Indian Reorganization Act of 1934, 48 Stat. 984, Congress imposed even stricter duties upon the Government with respect to Indian timber management. In

§ 6 of the Act, now codified as 25 U. S. C. § 466, Congress expressly directed that the Interior Department manage Indian forest resources "on the principle of sustained-yield management." Representative Howard, cosponsor of the Act and Chairman of the House Committee on Indian Affairs, explained that the purpose of the provision was "to assure a proper and permanent management of the Indian forest" under modern sustained-yield methods so as to "assure that the Indian forests will be permanently productive and will yield continuous revenues to the tribes." 78 Cong. Rec. 11730 (1934). See *United States* v. *Anderson*, 625 F. 2d 910, 915 (CA9 1980), cert. denied, 450 U. S. 920 (1981). Referring to the relationship between the Indians and the Government as a "sacred trust," Representative Howard stated that "[t]he failure of their governmental guardian to conserve the Indians' land and assets and the consequent loss of income or earning power, has been the principal cause of the present plight of the average Indian." 78 Cong. Rec., at 11726.[21]

Regulations promulgated under the Act required the preservation of Indian forest lands in a perpetually productive state, forbade the clear-cutting of large contiguous areas, called for the development of long-term working plans for all major reservations, required adequate provision for new growth when mature timber was removed, and required the regulation of run-off and the minimization of erosion.[22] The regulatory scheme was designed to assure that the Indians receive "'the benefit of whatever profit [the forest] is capable of yielding.'" *White Mountain Apache Tribe* v. *Bracker*, 448 U. S., at 149 (quoting 25 CFR § 141.3(a)(3) (1979)).

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[21] John Collier, the Commissioner of Indian Affairs and a principal author of the Act, had testified:

"[T]here must be a constructive handling of Indian timber. We have got to stop the slaughtering of Indian timber lands, to operate them on a perpetual yield basis and the bill expressly directs that this principle of conservation shall be applied throughout." Hearings on H. R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 1, p. 35 (1934).

[22] The Bureau of Indian Affairs' 1936 General Forest Regulations remain essentially unchanged within 25 CFR pt. 163 (1983).

In 1964 Congress amended the timber provisions of the 1910 Act, again emphasizing the Secretary of the Interior's management duties. Act of Apr. 30, 1964, 78 Stat. 186. As to sales of timber on allotted lands, the Secretary was directed to consider "the needs and best interests of the Indian owner and his heirs." 25 U. S. C. § 406(a). In performing this duty, the Secretary was specifically required to take into account

> "(1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, (2) the highest and best use of the land, including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs." *Ibid.*

See also 25 U. S. C. § 407 (timber sales on unallotted trust lands).

The timber management statutes, 25 U. S. C. §§ 406, 407, 466, and the regulations promulgated thereunder, 25 CFR pt. 163 (1983), establish the "comprehensive" responsibilities of the Federal Government in managing the harvesting of Indian timber. *White Mountain Apache Tribe* v. *Bracker*, 448 U. S., at 145. The Department of the Interior—through the Bureau of Indian Affairs—"exercises literally daily supervision over the harvesting and management of tribal timber." *Id.*, at 147.[23] Virtually every stage of the process is under federal control.[24]

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[23] By virtue of the Act of Feb. 14, 1920, § 1, 41 Stat. 415, as amended by the Act of Mar. 1, 1933, ch. 158, 47 Stat. 1417, the Secretary of the Interior is authorized to collect "reasonable fees" from Indian timber sale proceeds to cover the cost of the management and sale of the Indians' timber. 25 U. S. C. § 413. Sections 406 and 407, as amended in 1964, both provide for deductions of administrative expenses "to the extent permissible under

[Footnote 24 is on p. 223]

The Department exercises comparable control over grants of rights-of-way on Indian lands held in trust.[25] The Secretary is empowered to grant rights-of-way for all purposes across trust land, 25 U. S. C. § 323, provided that he obtains the consent of the tribal or individual Indian landowner, § 324,[26] and that the Indian owners are paid appropriate compensation, § 325. Regulations detail the scope of federal supervision. 25 CFR pt. 169 (1983).[27] For example, an applicant for a right-of-way must deposit with the Secretary an amount not less than the fair market value of the rights granted, plus an amount to cover potential damages associated with activity on the right-of-way. The Secretary must determine the adequacy of the compensation, and the amounts deposited must be held in a special account for distribution to Indian landowners. See 25 CFR §§ 169.12, 169.14 (1983).[28]

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section 413." See also 25 CFR § 163.18 (1983). Respondents have asserted that administrative fee deductions were excessive or improper in several respects. The Court of Claims concluded that there is "undoubted consent-to-suit for such claims that the Government illegally kept some of the Indians' own money or property." 229 Ct. Cl. 1, 15, 664 F. 2d 265, 274 (1981), citing *United States* v. *Testan*, 424 U. S. 392, 400–401 (1976); *Eastport S.S. Corp.* v. *United States*, 178 Ct. Cl. 599, 605–606, 372 F. 2d 1002, 1007–1008 (1967). The Government does not appear to dispute this conclusion. Brief for United States 33, n. 27.

[24] The Secretary even has authority to invest tribal and individual Indian funds held in trust in banks, bonds, notes, or other public debt obligations of the United States if deemed advisable and for the best interest of the Indians. Act of June 24, 1938, 52 Stat. 1037, 25 U. S. C. § 162a. In this case the funds maintained on behalf of individual allottees were derived primarily from timber sales.

[25] See Act of Feb. 5, 1948, 62 Stat. 17, codified in part at 25 U. S. C. §§ 323–325. See also Act of May 26, 1928, 45 Stat. 750, 25 U. S. C. § 318a (road building).

[26] Rights-of-way over lands of individual Indians may be granted without the consent of the owners under certain specific circumstances. § 324.

[27] Such regulations have a long history. See 25 CFR pt. 256 (1949).

[28] See also 25 CFR § 169.3 (1983) (consent of Indian landowners to grants of rights-of-way); § 169.5 (specifying required elements of agreements be-

B

In *United States* v. *Mitchell*, 445 U. S., at 542, this Court recognized that the General Allotment Act creates a trust relationship between the United States and Indian allottees but concluded that the trust relationship was limited. We held that the Act could not be read "as establishing that the United States has a fiduciary responsibility for management of allotted forest lands." *Id.*, at 546. In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.

The language of these statutory and regulatory provisions directly supports the existence of a fiduciary relationship. For example, § 8 of the 1910 Act, as amended, expressly mandates that sales of timber from Indian trust lands be based upon the Secretary's consideration of "the needs and best interests of the Indian owner and his heirs" and that proceeds from such sales be paid to owners "or disposed of for their benefit." 25 U. S. C. § 406(a). Similarly, even in its earliest regulations, the Government recognized its duties in "managing the Indian forests so as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests." U. S. Office of Indian Affairs, Regulations and Instructions for Officers in Charge of Forests on Indian Reservations 4 (1911). Thus, the Government has "expressed a firm desire that the Tribe should retain the benefits derived from the harvesting and sale of reserva-

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tween Secretary and applicants, including stipulation that upon termination of the right-of-way the applicant will restore land to its original condition so far as is reasonably possible). As to roads on Indian reservations, respondents have alleged improper deduction of road maintenance costs as a charge against the allottees' timber payments.

tion timber." *White Mountain Apache Tribe* v. *Bracker*, 448 U. S., at 149.[29]

Moreover, a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds).[30] "[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." *Navajo Tribe of Indians* v. *United States*, 224 Ct. Cl. 171, 183, 624 F. 2d 981, 987 (1980).

Our construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people. This Court has previously emphasized "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." *Seminole Nation* v. *United States*, 316 U. S. 286, 296 (1942). This principle has long dominated the Government's dealings with Indians. *United States* v. *Mason*, 412 U. S. 391, 398 (1973); *Minnesota* v. *United States*, 305 U. S. 382, 386 (1939); *United States* v. *Shoshone Tribe*, 304 U. S. 111, 117–118 (1938); *United States* v. *Candelaria*, 271 U. S. 432, 442 (1926); *McKay* v. *Kalyton*, 204 U. S. 458, 469 (1907); *Minnesota* v. *Hitchcock*, 185 U. S. 373, 396 (1902); *United States* v.

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[29] The pattern of pervasive federal control evident in the area of timber sales and timber management applies equally to grants of rights-of-way and to management of Indian funds. See *supra*, at 223, and n. 24.

[30] See Restatement (Second) of Trusts § 2, Comment *h*, p. 10 (1959).

Kagama, 118 U. S. 375, 382–384 (1886); *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17 (1831).

Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained. Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust. See Restatement (Second) of Trusts §§205–212 (1959); G. Bogert, Law of Trusts and Trustees §862 (2d ed. 1965); 3 A. Scott, Law of Trusts §205 (3d ed. 1967). This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust.[31]

The recognition of a damages remedy also furthers the purposes of the statutes and regulations, which clearly require that the Secretary manage Indian resources so as to generate proceeds for the Indians. It would be anomalous to conclude that these enactments create a right to the value of certain resources when the Secretary lives up to his duties, but no right to the value of the resources if the Secretary's duties are not performed. "Absent a retrospective damages remedy, there would be little to deter federal officials from violating their trust duties, at least until the allottees managed to obtain a judicial decree against future breaches of trust." *United States* v. *Mitchell*, 445 U. S., at 550 (WHITE, J., dissenting). Cf. H. R. Rep. No. 1466, 79th Cong., 1st Sess., 5 (1945).

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[31] See, *e. g.*, *Seminole Nation* v. *United States*, 316 U. S. 286, 295–300 (1942); *United States* v. *Creek Nation*, 295 U. S. 103, 109–110 (1935); *Moose* v. *United States*, 674 F. 2d 1277, 1281 (CA9 1982); *Whiskers* v. *United States*, 600 F. 2d 1332, 1335 (CA10 1979), cert. denied, 444 U. S. 1078 (1980); *Coast Indian Community* v. *United States*, 213 Ct. Cl. 129, 152–156, 550 F. 2d 639, 652–654 (1977); *Cheyenne-Arapaho Tribes* v. *United States*, 206 Ct. Cl. 340, 345, 512 F. 2d 1390, 1392 (1975); *Mason* v. *United States*, 198 Ct. Cl. 599, 613–616, 461 F. 2d 1364, 1372–1373 (1972), rev'd on other grounds, 412 U. S. 391 (1973); *Navajo Tribe* v. *United States*, 176 Ct. Cl. 502, 507, 364 F. 2d 320, 322 (1966); *Klamath & Modoc Tribes* v. *United States*, 174 Ct. Cl. 483, 490–491 (1966); *Menominee Tribe* v. *United States*, 102 Ct. Cl. 555, 562, 59 F. Supp. 137, 140 (1945); *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 18–20 (1944); *Smith* v. *United States*, 515 F. Supp. 56, 60 (ND Cal. 1978); *Manchester Band of Pomo Indians, Inc.* v. *United States*, 363 F. Supp. 1238, 1243–1248 (ND Cal. 1973).

The Government contends that violations of duties imposed by the various statutes may be cured by actions for declaratory, injunctive, or mandamus relief against the Secretary, although it concedes that sovereign immunity might have barred such suits before 1976.[32] Brief for United States 40. In this context, however, prospective equitable remedies are totally inadequate. To begin with, the Indian allottees are in no position to monitor federal management of their lands on a consistent basis. Many are poorly educated, most are absentee owners, and many do not even know the exact physical location of their allotments. Indeed, it was the very recognition of the inability of the Indians to oversee their interests that led to federal management in the first place. A trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement.

In addition, by the time Government mismanagement becomes apparent, the damage to Indian resources may be so severe that a prospective remedy may be next to worthless. For example, if timber on an allotment has been destroyed through Government mismanagement, it will take many years for nature to restore the timber. As this Court has observed:

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[32] See *Naganab* v. *Hitchcock*, 202 U. S. 473, 475–476 (1906). In 1976 Congress enacted a general consent to such suits. See 5 U. S. C. § 702.

> "Once logged off, the land is of little value. The land no longer serves the purpose for which it was by treaty set aside to [the allottee's] ancestors, and for which it was allotted to him. It can no longer be adequate to his needs and serve the purpose of bringing him finally to a state of competency and independence." *Squire* v. *Capoeman*, 351 U. S. 1, 10 (1956) (footnote omitted).

We thus conclude that the statutes and regulations at issue here can fairly be interpreted as mandating compensation by the Federal Government for violations of its fiduciary responsibilities in the management of Indian property. The Court of Claims[33] therefore has jurisdiction over respondents' claims for alleged breaches of trusts.

IV

The judgment of the Court of Claims is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

The controlling law in this case is clear. Speaking for the Court in *United States* v. *Mitchell*, 445 U. S. 535 (1980) *(Mitchell I)*, JUSTICE MARSHALL reaffirmed the general principle that a cause of action for damages against the United States "'cannot be implied but must be unequivocally expressed.'" *Id.*, at 538 (quoting *United States* v. *King*, 395 U. S. 1, 4 (1969)). See *United States* v. *Hopkins*, 427 U. S. 123, 128 (1976) ("specific command of statute or authorized regulation"); *Lehman* v. *Nakshian*, 453 U. S. 156, 170 (1981) (BRENNAN, J., dissenting). Where, as here, a claim for money damages is predicated upon an alleged statutory violation, the rule is that the statute does not create a cause of action for damages unless the statute "'in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *United States* v. *Testan*, 424 U. S. 392, 402 (1976) (quoting *Eastport S.S. Corp.* v. *United States*, 178 Ct. Cl. 599, 607, 372 F. 2d 1002, 1008, 1009 (1967)). See, *e. g.*, *Army & Air Force Exchange Service* v. *Sheehan*, 456 U. S. 728, 739–740 (1982) ("*Testan* [held] that the Tucker Act provides a remedy only where damages claims against the United States have been authorized *explicitly*") (emphasis added); *id.*, at 739 (damages remedy available where the regulations "specifically authorize awards of money damages"); *id.*, at 741 (reaffirming that an action for damages under the Tucker Act may not be premised upon "regulations . . . which do not explicitly authorize damages awards"). In sum, whether the United States has created a cause of action turns upon the intent of Congress, not the inclinations of the courts. See *United States* v. *Shaw*, 309 U. S. 495, 500 (1940) ("specific statutory consent"); *Munro* v. *United States*, 303 U. S. 36, 41 (1938) ("only by permission").

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[33] In the Federal Courts Improvement Act of 1982, 28 U. S. C. § 41 (1982 ed.), Congress merged the Court of Claims and the Court of Customs and Patent Appeals into a new federal court of appeals, the United States Court of Appeals for the Federal Circuit. The Act also created a new Art. I trial forum known as the United States Claims Court, which inherited the trial jurisdiction of the Court of Claims. 28 U. S. C. § 171 (1982 ed.). See S. Rep. No. 97–275, p. 2 (1981).

Today, the Court appears disinterested in the intent of Congress. It has effectively reversed the presumption that absent "affirmative statutory authority," *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506, 514 (1940), the United States has not consented to be sued for damages. It has substituted a contrary presumption, applicable to the conduct of the United States in Indian affairs, that the United States has consented to be sued for statutory violations and other departures from the rules that govern private fiduciaries. I dissent from the Court's departure from long-settled principles.

I

The Court does not—and clearly cannot—contend that any of the statutes standing alone reflects the necessary legislative authorization of a damages remedy. None of the statutes contains any "provision . . . that expressly makes the United States liable" for its alleged mismanagement of Indian forest resources and their proceeds or grants a right of action "with specificity." *Testan*, *supra*, at 399, 400. Indeed, nothing in the timber-sales statutes, 25 U. S. C. §§406, 407,[1] 466,[2] the road and right-of-way statutes, §§318a, 323–325,[3] or the interest statute, § 162a,[4] addresses in any respect the institution of damages actions against the United States. Nor is there any indication in the legislative history of the statutes that Congress intended to consent to damages actions for mismanagement of Indian assets by enacting these provisions.[5] The Court does not suggest otherwise.

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[1] The only monetary obligation imposed upon the Secretary by §406 or §407 is to pay the actual "proceeds" of timber sales to the owners of the land. Thus, while it may well be that those sections would permit an action to compel the Secretary to pay over unlawfully retained proceeds, see *United States* v. *Testan*, 424 U. S., at 401, no statutory basis exists for extending that remedy to profits that arguably or ideally should have been, but were not, earned by the Secretary. On the contrary, the statutory recognition of a right to receive the "proceeds" of sales conducted suggests that this is the limit of any damages action implicitly authorized by Congress. See *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 14–15, 20–21 (1981). Cf. *United States* v. *Erika, Inc.*, 456 U. S. 201, 208 (1982).

[2] Section 466 merely requires the Secretary to "make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management."

[3] Section 318a authorizes the appropriation of funds for building of roads on Indian reservations. It would be a radical change in the law of sovereign immunity to hold that a routine authorization statute allows individuals who might benefit from appropriations to bring an action to recover damages. And although §325 requires "the payment of such compensation as the Secretary of the Interior shall determine to be just," it does not follow that damages for failure to secure more generous compensation are available. Indeed, the explicit statutory recognition of the Secretary's

The Court for the most part rests its decision on the implausible proposition that statutes that do not in terms create a right to payment of money nonetheless may support a damages action against the United States. This view simply cannot be reconciled with the decisions in *Testan* and

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authority to determine the amount of compensation militates against any damages remedy for insufficient compensation. See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 644–645 (1981); *Plumbers & Pipefitters* v. *Plumbers & Pipefitters*, 452 U. S. 615, 630 (1981) (BURGER, C. J., dissenting).

[4] Section 162a affords the Secretary substantial discretion respecting investments to be made with individual Indian funds. There is nothing in the statute that requires payment of a particular rate of interest, much less that makes the United States accountable in damages for any amount by which the revenues earned fall short of a standard of "reasonable management zeal to get for the Indians the best rate." 229 Ct. Cl. 1, 15–16, 664 F. 2d 265, 274 (1981).

[5] It is improbable that Congress intended § 406 to constitute consent to monetary liability for forestry mismanagement on allotted lands, because before 1924, the Government maintained the position that heavily forested lands were not to be allotted. See *United States* v. *Payne*, 264 U. S. 446, 449 (1924); Brief for United States 3, n. 2. And before 1964, § 406 was a rather bare instrument, simply giving an Indian permission to sell his timber with the Secretary's permission. See *ante*, at 219–220. The legislative history of the 1964 amendments to § 406, see *ante*, at 222, also fails to supply the necessary evidence of congressional intent. The House Report states that "[n]o additional expenditure of Federal funds" was expected to be incurred by reason of the enactment of the legislation. H. R. Rep. No. 1292, 88th Cong., 2d Sess., 2 (1964). A letter from the Interior Department to the Congress urging enactment of the legislation explained only that the standards for timber sales on allotted lands "should help allay disputes and avoid misunderstanding." S. Rep. No. 672, 88th Cong., 1st Sess., 3 (1963).

Mitchell I. A nonmonetary duty,[6] without more, is insufficient to overcome the "presumption" that Congress has not consented to suit for money damages. See *Eastern Transportation Co.* v. *United States*, 272 U. S. 675, 686 (1927).

This Court has had occasion in recent cases to emphasize that congressional intent is the ultimate standard in determining whether a private right of action should be inferred from a statute that does not, in terms, provide for such an action.[7] Those cases are instructive, for here, too, the "ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 578 (1979). As we recognized in *Testan*, courts are not free to dispense with "established principles" requiring explicit congressional authorization for maintenance of suits against the United States simply "because it might be thought that they should be responsive to a particular conception of enlightened governmental policy." 424 U. S., at 400. See *Shaw*, 309 U. S., at 502. The Court today adduces no "evidence that Congress anticipated that there would be a private remedy." *California* v. *Sierra Club*, 451 U. S. 287, 298 (1981).

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[6] Although not dispositive, the monetary character of a statutory right is a strong indication that a statute "in itself . . . can fairly be interpreted as mandating compensation." By contrast, where, as here, the duties imposed by a statute are not essentially monetary in character, but require implementation through conduct by federal officials, the contrary inference arises: that Congress, by its silence as to a damages remedy, created only a substantive right enforceable through injunctive relief. See *Testan*, *supra*, at 401, n. 5, 403.

[7] See, *e. g.*, *Jackson Transit Authority* v. *Transit Union*, 457 U. S. 15, 20–23 (1982); *Middlesex County Sewerage Authority*, *supra*, at 13–18; *Texas Industries*, *supra*, at 639–640; *California* v. *Sierra Club*, 451 U. S. 287, 292–298 (1981); *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77, 91–95 (1981); *Universities Research Assn.* v. *Coutu*, 450 U. S. 754, 770–784 (1981); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 19–24 (1979). Against the background of sovereign immunity, the rationale of these cases should apply here with particular force.

The Court defends its departure from our precedents on the ground that the statutes and regulations upon which respondents rely need not be "construed in the manner appropriate to waivers of sovereign immunity." *Ante*, at 219. The Court in effect is overruling *Mitchell I sub silentio*, for as its discussion on the Tucker Act makes clear, see *ante*, at 216–219, we there at least "accepted the government's . . . claim that a strict standard of construction, applicable to deciding whether Congress had enacted a waiver of sovereign immunity, should be applied in interpreting substantive legislation for the benefit of Indian people." Hughes, Can the Trustee be Sued for its Breach? The Sad Saga of United States v. Mitchell, 26 S. D. L. Rev. 447, 473 (1981). We expressly held that the General Allotment Act at issue in *Mitchell I* "does not *unambiguously* provide that the United States has undertaken full fiduciary responsibilities." 445 U. S., at 542 (emphasis added). Cf. *Army & Air Force Exchange Service* v. *Sheehan*, 456 U. S., at 739 ("explicitly reject[ing] the argument that 'the violation of any statute or regulation . . . automatically creates a cause of action against the United States for money damages'") (quoting *Testan*, 424 U. S., at 401). The Court hardly can view the statutes here as "unambiguously" imposing trust duties on the Government.

II

The Court makes little or no pretense that it is following doctrine heretofore established. Without pertinent analysis, it simply concludes: "Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained." *Ante*, at 226. This conclusion rests on two dubious assumptions. First, the Court decides that the statutes create or recognize fiduciary duties. It then reasons that because a private express trust normally imports a right to recover damages for breach, and because injunctive relief is perceived to be inadequate, Congress necessarily must have authorized recovery of damages for failure to perform the statutory duties properly. The relevancy of the first conclusion is questionable, and the other departs from our precedents, chiefly *Testan* and *Mitchell I*.

The Court simply asserts that the statutes here "clearly establish fiduciary obligations." *Ante*, at 226. See also *ante*, at 225 ("a fiduciary relationship necessarily arises"). I agree with the dissent in the Court of Claims that "there is kind of a bootstrap quality of reasoning in saying that [the United States'] duties expressed by law are those of a trustee, and, therefore, we may look at SCOTT ON TRUSTS or the RESTATEMENT OF TRUSTS and impose on [the Government] all the other consequences the law, as stated by those authorities, derives from the status of an erring nongovernmental trustee." 229 Ct. Cl. 1, 31, 664 F. 2d 265, 283 (1981) (Nichols, J., concurring and dissenting). "The federal power over Indian lands is so different in nature and origin from that of a private trustee . . . that caution is taught in using the mere label of a trust plus a reading of SCOTT ON TRUSTS to impose liability on claims where assent is not unequivocally expressed." *Id.*, at 32, 664 F. 2d, at 283.[8] The trusteeships to which the Court has referred in the past have manifested more the view that pervasive control over Indian life is such a high attribute of federal sovereignty that States cannot infringe upon that control. *Ibid.*[9] The Court today turns this shield into a sword.

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[8] "There are a number of widely varying relationships which more or less closely resemble trusts, but which are not trusts, although the term 'trust' is sometimes used loosely to cover such relationships. It is important to differentiate trusts from these other relationships, since many of the rules applicable to trusts are not applicable to them." Restatement (Second) of Trusts § 4, Introductory Note, p. 15 (1959). For example, the Court often has described the fiduciary relationship between the United States and Indians as one between a guardian and a ward. See, *e. g., Klamath Indians* v. *United States*, 296 U. S. 244, 254 (1935); *United States* v. *Kagama*, 118 U. S. 375, 383 (1886). But "[a] guardianship is not a trust." Restatement (Second) of Trusts § 7. There is no explanation, however, why the Court chooses one analogy and not another. The choice appears to be influenced

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by the fact that "[t]he duties of a trustee are more intensive than the duties of some other fiduciaries." *Id.*, § 2, Comment *b*.

The Court asserts that "[a]ll of the necessary elements of a common-law trust are present"—a trustee, a beneficiary, and a trust corpus. *Ante*, at 225. But two persons and a parcel of real property, without more, do not create a trust. Rather, "[a] trust . . . arises as a result of a manifestation of an intention to create it." Restatement (Second) of Trusts § 2. See *id.*, § 23 ("A trust is created only if the settlor properly manifests an intention to create a trust"); *id.*, § 25 ("No trust is created unless the settlor manifests an intention to impose enforceable duties"). This is the element that is missing in this case, and the Court does not, and cannot, find that Congress has manifested its intent to make the statutory duties upon which respondents rely trust duties. Cf. *id.*, § 95; 2 A. Scott, Law of Trusts § 95, p. 772 (3d ed. 1967) ("At common law it was held that a use . . . could not be enforced against the Crown . . .").

Indeed, given the language of the statute at issue in *Mitchell I*, the case for finding that Congress intended to impose fiduciary obligations on the United States was much stronger there than it is here. See 445 U. S., at 547 (WHITE, J., dissenting). One of the authorities cited by JUSTICE WHITE, 2 Scott, *supra*, § 95, specifically discusses the General Allotment Act as an example of the United States acting as a trustee. Furthermore, a trustee can "reserv[e] powers with respect to the administration of the trust." Restatement (Second) of Trusts § 37. Unless the United States agrees to be held liable in damages, even the existence of a trust does not necessarily establish that the Government has surrendered its immunity from damages.

[9] The Court has invoked the fiduciary relation primarily (i) to preclude unauthorized state interference in the relations between the United States and the Indian tribes or other unauthorized exercise of state jurisdiction on Indian lands, see, *e. g.*, *Kagama*, *supra*, at 382–384; (ii) to bar or nullify exercises of state court jurisdiction in matters affecting Indian property rights, in which the United States was not properly joined or represented, see, *e. g.*, *Minnesota* v. *United States*, 305 U. S. 382, 386 (1939); *United States* v. *Candelaria*, 271 U. S. 432, 442–444 (1926); (iii) to interpret doubtful or ambiguous treaty language in favor of the Indians, see, *e. g.*, *United States* v. *Shoshone Tribe*, 304 U. S. 111, 117–118 (1938); *Minnesota* v. *Hitchcock*, 185 U. S. 373, 396 (1902); (iv) to determine the liability of the

In my view, it is clear that "[n]othing on the face" of any of the statutes at issue, *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 59 (1978), or in their legislative histories, "fairly [can] be interpreted as mandating compensation" for the conduct alleged by respondents. Some of the statutes involved here, to be sure, create substantive duties that the Secretary must fulfill. But this could equally be said of the Classification Act, considered in *Testan*. It requires that pay classification ratings of federal employees be carried out pursuant to "the principle of equal pay for substantially equal work." 5 U. S. C. § 5101(1)(A). Although the federal employee in *Testan* alleged a violation of the Act, the Court concluded that a backpay remedy was unavailable, rejecting the argument that the substantive right necessarily implies a damages remedy. 424 U. S., at 400–403.

Ignoring this holding in *Testan*, the Court concludes that the mere existence of a trust of some kind *necessarily* establishes that Congress has consented to a recovery of damages. In effect we are told to accept on faith the existence of a damages cause of action: "Given the existence of a trust relationship, it *naturally follows* that the Government should be liable in damages for the breach of its fiduciary duties." *Ante*, at 226 (emphasis added). See also *ibid.* (damages are a "fundamental incident" of a trust relationship); *ante*, at 227 (it would be "anomalous" not to find a damages remedy). The

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United States for damages under the Just Compensation Clause where, acting as a fiduciary manager, it has converted the form of Indian property, see, *e. g.*, *United States* v. *Sioux Nation of Indians*, 448 U. S. 371, 415–416 (1980); and (v) to emphasize the high standard of care that the United States is obliged to exercise in carrying out its duties respecting the Indians, see, *e. g.*, *United States* v. *Mason*, 412 U. S. 391, 398 (1973); *Seminole Nation* v. *United States*, 316 U. S. 286, 296–297 (1942). But the Court has never, until today, invoked the doctrine to hold that the United States is answerable in money damages for breaches of the standards applicable to a private fiduciary.

Court can find no more support for this proposition than the dissenting opinion in *Mitchell I.* See *ibid.*[10]

It is fair to say that the Court is influenced by its view that an injunctive remedy is inadequate to redress the violations alleged—precisely the inference deemed inadmissible in *Testan.*[11] It is the ordinary result of sovereign immunity that unconsented claims for money damages are barred. The fact that damages cannot be recovered without the sovereign's consent hardly supports the conclusion that consent has been given. Yet this, in substance, is the Court's reasoning. If it is saying that a remedy is necessary to redress every injury sustained, the doctrine of sovereign immunity will have been drained of all meaning. Moreover, "many of the federal statutes . . . that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be rendered superfluous." *Testan,* 424 U. S., at 404.

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[10] The Court reaches for support in *Seminole Nation* v. *United States, supra,* and *United States* v. *Creek Nation,* 295 U. S. 103 (1935), but both cases cut against the Court's theory in this case. The discussion of the Government's fiduciary duty in *Seminole Nation* referred to a claim to compel payments expressly prescribed by Treaty. See 316 U. S., at 296–297. *Creek Nation* involved a taking claim.

[11] Also significant is the Court's standardless remand for further proceedings consistent with its opinion. Where the statute upon which liability is premised creates no right to payment of a sum certain, the Court of Claims (now the United States Claims Court) will be required, without legislative guidance, to determine the extent of liability, if any, and the items of damages that are cognizable. This task, unlike the factual or legal determination whether a particular individual falls within a class granted a right to payment of money by a statute, is not one to which courts are adapted. Any rules established will be of "judicial cloth, not legislative cloth." *Weinberger* v. *Catholic Action of Hawaii/Peace Education Project,* 454 U. S. 139, 141 (1981). I assume, however, that the law of trusts generally will control and that all defenses to actions on breaches of trust, such as consent by the beneficiary and laches, will be fully available to the United States. Cf. 229 Ct. Cl., at 15–16, 664 F. 2d, at 274.

III

The Court has made no effort to demonstrate that Congress intended to render the United States answerable in damages upon claims of the kind presented here. The mere application by a court of the label "trust" cannot properly justify disregard of an immunity from damages the Government has never waived. I would reverse the judgment of the Court of Claims.

CITY OF REVERE *v.* MASSACHUSETTS GENERAL HOSPITAL

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 82-63. Argued February 28, 1983—Decided June 27, 1983

A police officer of petitioner city wounded a suspect who was attempting to flee from the scene of a breaking and entering. The Massachusetts Supreme Judicial Court held that petitioner is liable for the medical services rendered by respondent hospital to the wounded person.

Held:

1. This Court does not lack jurisdiction to review the Massachusetts court's opinion on the asserted ground that the decision rested on an adequate and independent state ground. The Massachusetts court's opinion premised petitioner's liability squarely on the Eighth Amendment's prohibition of cruel and unusual punishments. P. 242.

2. Respondent has standing in the Art. III sense to raise its constitutional claim in this Court. Moreover, invoking prudential limitations on respondent's assertion of the rights of a third party (the wounded person) would serve no functional purpose. Cf. *Craig* v. *Boren*, 429 U. S. 190. Pp. 242–243.

3. The relevant constitutional provision is not the Eighth Amendment but is, instead, the Due Process Clause of the Fourteenth Amendment. Although the Eighth Amendment's proscription of cruel and unusual punishments is violated by deliberate indifference to serious medical needs of prisoners, Eighth Amendment scrutiny is appropriate only after the State has secured a formal adjudication of guilt. *Ingraham* v. *Wright*, 430 U. S. 651. Here, there had been no formal adjudication of guilt against the wounded person at the time he required medical care. Pp. 243–244.

4. The Due Process Clause requires the responsible governmental entity to provide medical care to persons who have been injured while being apprehended by the police. However, as long as the governmental entity ensures that the medical care needed is in fact provided, the Constitution does not dictate how the cost of that care should be allocated as between the entity and the provider of the care. That is a matter of state law. Here, petitioner fulfilled its constitutional obligation by seeing that the wounded person received the needed medical treatment; how petitioner obtained such treatment is not a federal constitutional question. Pp. 244–246.

385 Mass. 772, 434 N. E. 2d 185, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, POWELL, and O'CONNOR, JJ., joined, and in Parts I, II, III–A, and IV of which WHITE and REHNQUIST, JJ., joined. REHNQUIST, J., filed an opinion concurring in part and concurring in the judgment, in which WHITE, J., joined, *post*, p. 246. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 246.

Ira H. Zaleznik argued the cause for petitioner. With him on the briefs was *Valerie L. Pawson*.

Michael Broad argued the cause for respondent. With him on the brief was *Ernest M. Haddad*.*

JUSTICE BLACKMUN delivered the opinion of the Court.

The issue in this case is whether a municipality's constitutional duty to obtain necessary medical care for a person injured by the municipality's police in the performance of their duties includes a corresponding duty to compensate the provider of that medical care.

I

On September 20, 1978, members of the police force of petitioner city of Revere, Mass., responded to a report of a breaking and entering in progress. At the scene they sought to detain a man named Patrick M. Kivlin, who attempted to flee. When repeated commands to stop and a warning shot failed to halt Kivlin's flight, an officer fired at Kivlin and wounded him. The officers summoned a private ambulance. It took Kivlin, accompanied by one officer, to the emergency room of respondent Massachusetts General

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*Briefs of *amici curiae* urging reversal were filed by *Paul R. Devin* for the City of Fitchburg et al.; and by *Daniel J. Popeo, Paul D. Kamenar,* and *Nicholas E. Calio* for the Washington Legal Foundation.

William T. McGrail filed a brief for the Massachusetts Hospital Association, Inc., as *amicus curiae* urging affirmance.

Charles S. Sims, Burt Neuborne, and *John Reinstein* filed a brief for the American Civil Liberties Union et al. as *amici curiae*

Hospital (MGH) in Boston.[1] Kivlin was hospitalized at MGH from September 20 until September 29. Upon his release, Revere police served him with an arrest warrant that had been issued on September 26. Kivlin was arraigned and released on his own recognizance.

On October 18, MGH sent the Chief of Police of Revere a bill for $7,948.50 for its services to Kivlin. The Chief responded immediately by a letter denying responsibility for the bill. On October 27, Kivlin returned to MGH for further treatment. He was released on November 10; the bill for services rendered during this second stay was $5,360.41.[2]

In January 1979, MGH sued Revere in state court to recover the full cost of its hospital services rendered to Kivlin. The Superior Court for the County of Suffolk dismissed the complaint. MGH appealed, and the Supreme Judicial Court of Massachusetts transferred the case to its own docket.

The Supreme Judicial Court reversed in part, holding that "the constitutional prohibition against cruel and unusual punishment, embodied in the Eighth Amendment to the United States Constitution [as applied to the States through the Fourteenth Amendment], requires that Revere be liable to the hospital for the medical services rendered to Kivlin during his first stay at the hospital." 385 Mass. 772, 774, 434 N. E. 2d 185, 186 (1982). The court apparently believed that such a rule was needed to ensure that persons in police custody receive necessary medical attention.[3] In view of this rather novel Eighth Amendment approach and the importance of delineating governmental responsibility in a situation of this kind, we granted certiorari. 459 U. S. 820 (1982).

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[1] The city of Revere apparently has no municipal hospital or even a jail of its own. See App. 14.

[2] Nothing in the record indicates that MGH ever tried to obtain payment from Kivlin.

[3] Because it ruled that Kivlin was no longer in custody when he returned to MGH on October 27, the court concluded that Revere was not liable to MGH for the services rendered during the second hospitalization. 385 Mass., at 779–780, 434 N. E. 2d, at 189–190. That issue is not before us.

II

We first address two preliminary issues.

A

MGH suggests that we lack jurisdiction to decide this case because the state-court decision rests on an adequate and independent state ground. The Supreme Judicial Court's opinion, however, stated unequivocally that state contract law provided no basis for ordering Revere to pay MGH for the hospital services rendered to Kivlin, 385 Mass., at 774, 434 N. E. 2d, at 186, and that MGH had not invoked the Commonwealth's Constitution in support of its claim, *id.*, at 776, n. 6, 434 N. E. 2d, at 188, n. 6. In a section of its opinion entitled "Eighth Amendment," the court premised Revere's liability squarely on the Federal Constitution.[4] Because the court's decision was based on an interpretation of federal law, we have jurisdiction notwithstanding the fact that the same decision, had it rested on state law, would be unreviewable here. See *Oregon* v. *Hass*, 420 U. S. 714, 719, and n. 4 (1975).

B

The parties submit various arguments concerning MGH's "standing" to raise its constitutional claim in this Court.

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[4] The court stated:

"The hospital argues that the prohibition against deliberate indifference to the medical needs of prisoners contained implicitly in the Eighth Amendment, *Estelle* v. *Gamble*, 429 U. S. 97 (1976), compels a government agency or division responsible for supplying those medical needs to pay for them. We agree." *Id.*, at 776, 434 N. E. 2d, at 187–188 (footnotes omitted).

Later, the court observed that inadequate funding, and the fact that payment would violate state law, were irrelevant: the Eighth Amendment required such payment, and prevailed over contrary state law. *Id.*, at 779, 434 N. E. 2d, at 189.

MGH, however, clearly has standing in the Article III sense: it performed services for which it has not been paid, and through this action it seeks to redress its economic loss directly.

Moreover, prudential reasons for refusing to permit a litigant to assert the constitutional rights of a third party are much weaker here than they were in *Craig* v. *Boren*, 429 U. S. 190, 193–194 (1976), where the Court permitted a seller of beer to challenge a statute prohibiting the sale of beer to males, but not to females, between the ages of 18 and 21. In this case, as in *Craig*, the plaintiff's assertion of *jus tertii* was not contested in the lower court, see 385 Mass., at 776–777, n. 7, 434 N. E. 2d, at 188, n. 7, and that court entertained the constitutional claim on its merits. Unlike *Craig*, this case arose in state court and the plaintiff, MGH, prevailed. The Supreme Judicial Court, of course, is not bound by the prudential limitations on *jus tertii* that apply to federal courts. The consequence of holding that MGH may not assert the rights of a third party (Kivlin) in this Court, therefore, would be to dismiss the writ of certiorari, leaving intact the state court's judgment in favor of MGH, the purportedly improper representative of the third party's constitutional rights. See *Doremus* v. *Board of Education*, 342 U. S. 429, 434–435 (1952). In these circumstances, invoking prudential limitations on MGH's assertion of *jus tertii* would "serve no functional purpose." *Craig* v. *Boren*, 429 U. S., at 194.[5]

III

A

The Eighth Amendment's proscription of cruel and unusual punishments is violated by "deliberate indifference to serious medical needs of prisoners." *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976). As MGH acknowledges, Brief for Respondent 3, on the facts of this case the relevant constitutional provision is not the Eighth Amendment but is, instead, the Due Process Clause of the Fourteenth Amendment. "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. . . . [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." *Ingraham* v. *Wright*, 430 U. S. 651, 671–672, n. 40 (1977); see *Bell* v. *Wolfish*, 441 U. S. 520, 535, n. 16 (1979). Because there had been no formal adjudication of guilt against Kivlin at the time he required medical care, the Eighth Amendment has no application.

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[5] In addition, we could not resolve the question whether MGH has third-party standing without addressing the constitutional issue. To a significant degree, the case "is in the class of those where standing and the merits are inextricably intertwined." *Holtzman* v. *Schlesinger*, 414 U. S. 1316, 1319 (1973) (Douglas, J., in chambers). Both the standing question and the merits depend in part on whether injured suspects will be deprived of

B

The Due Process Clause, however, does require the responsible government or governmental agency to provide medical care to persons, such as Kivlin, who have been injured while being apprehended by the police. In fact, the due process rights of a person in Kivlin's situation are at least as great as the Eighth Amendment protections available to a convicted prisoner. See *Bell* v. *Wolfish*, 441 U. S., at 535, n. 16, 545.[6] We need not define, in this case, Revere's due process obligation to pretrial detainees or to other persons in its care who require medical attention. See *Youngberg* v.

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their constitutional right to necessary medical care unless the governmental entity is required to pay hospitals for their services.

[6] The due process issue, raised by respondent as an alternative ground in support of the judgment, has been fully briefed and is properly before us. See *Dandridge* v. *Williams*, 397 U. S. 471, 475–476, n. 6 (1970). There is no reason to believe, moreover, that the Supreme Judicial Court's analysis of the rights of pretrial detainees would be any different under the Due Process Clause. No factual issues are in dispute, and there would be little point in remanding the case merely to allow the Supreme Judicial Court to reconsider its holding under the relevant constitutional provision.

Romeo, 457 U. S. 307, 312, n. 11 (1982); *Norris* v. *Frame*, 585 F. 2d 1183, 1187 (CA3 1978); *Loe* v. *Armistead*, 582 F. 2d 1291 (CA4 1978), cert. denied *sub nom. Moffitt* v. *Loe*, 446 U. S. 928 (1980). Whatever the standard may be, Revere fulfilled its constitutional obligation by seeing that Kivlin was taken promptly to a hospital that provided the treatment necessary for his injury. And as long as the governmental entity ensures that the medical care needed is in fact provided, the Constitution does not dictate how the cost of that care should be allocated as between the entity and the provider of the care. That is a matter of state law.

If, of course, the governmental entity can obtain the medical care needed for a detainee only by paying for it, then it must pay. There are, however, other means by which the entity could meet its obligation. Many hospitals are subject to federal or state laws that require them to provide care to indigents. Hospitals receiving federal grant money under the Hill-Burton Act, for example, must supply a reasonable amount of free care to indigents. See 42 U. S. C. § 291c(e). In the Commonwealth of Massachusetts now, any hospital with an emergency facility must provide emergency services regardless of the patient's ability to pay. Mass. Gen. Laws Ann., ch. 111, § 70E*(k)* (West Supp. 1983–1984), added by 1979 Mass. Acts, ch. 214, and amended by 1979 Mass. Acts, ch. 720. Refusal to provide treatment would subject the hospital to malpractice liability. § 70E. The governmental entity also may be able to satisfy its duty by operating its own hospital, or, possibly, by imposing on the willingness of hospitals and physicians to treat the sick regardless of the individual patient's ability to pay.[7]

In short, the injured detainee's constitutional right is to receive the needed medical treatment; how the city of Revere obtains such treatment is not a federal constitutional question.[8] It is not even certain that mandating government reimbursement of hospitals that treat injured persons in police custody would have the effect of increasing the availability or quality of care. Although such a requirement would serve to eliminate any reluctance on the part of private hospitals to provide treatment, it also might encourage police to take injured detainees to public hospitals, rather than private ones, regardless of their relative distances or ability to furnish particular services.

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[7] Nothing we say here affects any right a hospital or governmental entity may have to recover from a detainee the cost of the medical services provided to him.

IV

For these reasons, the judgment of the Supreme Judicial Court is reversed.

It is so ordered.

JUSTICE REHNQUIST, with whom JUSTICE WHITE joins, concurring in part and concurring in the judgment.

I see no reason to decide in this case what requirements the Due Process Clause may impose upon a governmental agency by way of providing medical care to persons who have been injured while being apprehended by the police. As the Court points out, "[w]hatever the standard may be, Revere fulfilled its constitutional obligation by seeing that Kivlin was taken promptly to a hospital that provided the treatment necessary for his injury." *Ante*, at 245. The Court's other statements regarding the application of the Due Process Clause in this situation, *ante*, at 244–245 and this page, are therefore unnecessary as well as largely unsupported.

I concur in Parts I, II, III–A, and IV of the Court's opinion.

JUSTICE STEVENS, concurring in the judgment.

This case raises a question of state fiscal policy. If the Mayor of the City of Revere had paid this bill because he had been advised by his attorney, or by the Attorney General of

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[8] We do not deal here, of course, with possible remedies for a pattern of constitutional violations.

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the State, that it was an obligation of the municipality, we would have had no interest in the matter, even if the legal advice had misinterpreted federal law. If the Massachusetts Legislature had passed a statute requiring bills of this character to be paid by the city, the performance of a city's state statutory obligation would give rise to no federal question. That would be true even if the legislative history of the statute made it perfectly clear that every lawmaker who voted for the bill did so because he believed that the Federal Constitution required the State to allocate the cost in this manner.

Because the Supreme Judicial Court of Massachusetts—rather than another branch of state government—invoked the Federal Constitution in imposing an expense on the City of Revere, this Court has the authority to review the decision. But is it a sensible exercise of discretion to wield that authority? I think not. There is "nothing in the Federal Constitution that prohibits a State from giving lawmaking power to its courts." *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 479 (1981) (STEVENS, J., dissenting). No individual right was violated in this case. The underlying issue of federal law has never before been deemed an issue of national significance. Since, however, the Court did (unwisely in my opinion) grant certiorari, I join its judgment.*

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*I agree with the Court's substantive analysis of this case, except for its assertion that the Eighth Amendment's prohibition against cruel and unusual punishment would not be violated by the State's imposition of cruel and unusual punishment on a prisoner before he has been convicted of a crime. I adhere to my views that the statements in support of that assertion in *Ingraham* v. *Wright*, 430 U. S. 651 (1977), and *Bell* v. *Wolfish*, 441 U. S. 520 (1979), simply cannot be squared with the text or the purpose of the Eighth Amendment. See *Ingraham*, *supra*, at 684–692 (WHITE, J., dissenting).

LEHR *v.* ROBERTSON ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 81-1756. Argued December 7, 1982—Decided June 27, 1983

Appellant is the putative father of a child born out of wedlock. Appellee mother of the child married another man (also an appellee) after the child was born. Subsequently, when the child was over two years old appellees filed an adoption petition in the Ulster County, N. Y., Family Court, which entered an order of adoption. Appellant never supported the child or offered to marry appellee mother, did not enter his name in New York's "putative father registry," which would have entitled him to notice of the adoption proceeding, and was not in any of the classes of putative fathers who are entitled under New York law to receive notice of adoption proceedings. After the adoption proceeding was commenced, appellant filed a paternity petition in the Westchester County, N. Y., Family Court. Appellant learned of the pending adoption proceeding several months later. Shortly thereafter, his attorney sought a stay of the adoption proceeding pending the determination of the paternity action, but by that time the Ulster County Family Court had entered the adoption order. Appellant filed a petition to vacate the adoption order on the ground that it was obtained in violation of his rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Ulster County Family Court denied the petition, and both the Appellate Division of the New York Supreme Court and the New York Court of Appeals affirmed.

Held:

1. Appellant's rights under the Due Process Clause were not violated. Pp. 256-265.

(a) Where an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," *Caban* v. *Mohammed*, 441 U. S. 380, 392, his interest in personal contact with his child acquires substantial protection under the Due Process Clause. But the mere existence of a biological link does not merit equivalent protection. If the natural father fails to grasp the opportunity to develop a relationship with his child, the Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie. Pp. 256-263.

(b) Here, New York has adequately protected appellant's inchoate interest in assuming a responsible role in the future of his child. Under New York's special statutory scheme, the right to receive notice was completely within appellant's control. By mailing a postcard to the putative father registry, he could have guaranteed that he would receive notice of any adoption proceedings. The State's conclusion that a more open-ended notice requirement would merely complicate the adoption process, threaten the privacy interests of unwed mothers, create the risk of unnecessary controversy, and impair the desired finality of adoption decrees, cannot be characterized as arbitrary. The Constitution does not require either the trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights. Pp. 263–265.

2. Nor were appellant's rights under the Equal Protection Clause violated. Because he has never established a substantial relationship with his child, the New York statutes at issue did not operate to deny him equal protection. Cf. *Quilloin* v. *Walcott*, 434 U. S. 246. Appellee mother had a continuous custodial responsibility for the child, whereas appellant never established any custodial, personal, or financial relationship with the child. In such circumstances, the Equal Protection Clause does not prevent a State from according the two parents different legal rights. *Caban* v. *Mohammed*, *supra*, distinguished. Pp. 265–268.

54 N. Y. 2d 417, 430 N. E. 2d 896, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 268.

David J. Freeman argued the cause and filed briefs for appellant.

Jay L. Samoff argued the cause for appellees and filed a brief for appellees Robertson et al. *Robert Abrams*, Attorney General, *pro se*, *Peter H. Schiff*, and *Robert J. Schack*, Assistant Attorney General, filed a brief for appellee Attorney General of New York.*

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether New York has sufficiently protected an unmarried father's inchoate relationship with a child whom he has never supported and rarely seen in

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**Louise Gruner Gans* and *Stanley A. Bass* filed a brief for Community Action for Legal Services, Inc., et al. as *amici curiae* urging reversal.

Elinor Hadley Stillman filed a brief for the National Committee for Adoption, Inc., as *amicus curiae* urging affirmance.

the two years since her birth. The appellant, Jonathan Lehr, claims that the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as interpreted in *Stanley* v. *Illinois*, 405 U. S. 645 (1972), and *Caban* v. *Mohammed*, 441 U. S. 380 (1979), give him an absolute right to notice and an opportunity to be heard before the child may be adopted. We disagree.

Jessica M. was born out of wedlock on November 9, 1976. Her mother, Lorraine Robertson, married Richard Robertson eight months after Jessica's birth.[1] On December 21, 1978, when Jessica was over two years old, the Robertsons filed an adoption petition in the Family Court of Ulster County, New York. The court heard their testimony and received a favorable report from the Ulster County Department of Social Services. On March 7, 1979, the court entered an order of adoption.[2] In this proceeding, appellant contends that the adoption order is invalid because he, Jessica's putative father, was not given advance notice of the adoption proceeding.[3]

The State of New York maintains a "putative father registry."[4] A man who files with that registry demonstrates his

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[1] Although both Lorraine and Richard Robertson are appellees in this proceeding, for ease of discussion the term "appellee" will hereafter be used to identify Lorraine Robertson.

[2] The order provided for the adoption of appellee's older daughter, Renee, as well as Jessica. Appellant does not challenge the adoption of Renee.

[3] Appellee has never conceded that appellant is Jessica's biological father, but for purposes of analysis in this opinion it will be assumed that he is.

[4] At the time Jessica's adoption order was entered, N. Y. Soc. Serv. Law § 372–c (McKinney Supp. 1982–1983) provided:

"1. The department shall establish a putative father registry which shall record the names and addresses of . . . any person who has filed with the registry before or after the birth of a child out-of-wedlock, a notice of intent to claim paternity of the child . . . .

"2. A person filing a notice of intent to claim paternity of a child . . . shall include therein his current address and shall notify the registry of any intent to claim paternity of a child born out of wedlock and is therefore entitled to receive notice of any proceeding to adopt that child. Before entering Jessica's adoption order, the Ulster County Family Court had the putative father registry examined. Although appellant claims to be Jessica's natural father, he had not entered his name in the registry.

In addition to the persons whose names are listed on the putative father registry, New York law requires that notice of an adoption proceeding be given to several other classes of possible fathers of children born out of wedlock—those who have been adjudicated to be the father, those who have been identified as the father on the child's birth certificate, those who live openly with the child and the child's mother and who hold themselves out to be the father, those who have been identified as the father by the mother in a sworn written statement, and those who were married to the child's mother before the child was six months old.[5] Appellant admittedly

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change of address pursuant to procedures prescribed by regulations of the department.

"3. A person who has filed a notice of intent to claim paternity may at any time revoke a notice of intent to claim paternity previously filed therewith and, upon receipt of such notification by the registry, the revoked notice of intent to claim paternity shall be deemed a nullity nunc pro tunc.

"4. An unrevoked notice of intent to claim paternity of a child may be introduced in evidence by any party, other than the person who filed such notice, in any proceeding in which such fact may be relevant.

"5. The department shall, upon request, provide the names and addresses of persons listed with the registry to any court or authorized agency, and such information shall not be divulged to any other person, except upon order of a court for good cause shown."

[5] At the time Jessica's adoption order was entered, N. Y. Dom. Rel. Law §§ 111-a (2) and (3) (McKinney 1977 and Supp. 1982–1983) provided:

"2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:

"(a) any person adjudicated by a court in this state to be the father of the child;

"(b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the was not a member of any of those classes. He had lived with appellee prior to Jessica's birth and visited her in the hospital when Jessica was born, but his name does not appear on Jessica's birth certificate. He did not live with appellee or Jessica after Jessica's birth, he has never provided them with any financial support, and he has never offered to marry appellee. Nevertheless, he contends that the following special circumstances gave him a constitutional right to notice and a hearing before Jessica was adopted.

On January 30, 1979, one month after the adoption proceeding was commenced in Ulster County, appellant filed a "visitation and paternity petition" in the Westchester County Family Court. In that petition, he asked for a determination of paternity, an order of support, and reasonable visitation privileges with Jessica. Notice of that proceeding was served on appellee on February 22, 1979. Four days later appellee's attorney informed the Ulster County Court that appellant had commenced a paternity proceeding in Westchester County; the Ulster County judge then entered an

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court order has been filed with the putative father registry, pursuant to section three hundred seventy-two-c of the social services law;

"(c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two of the social services law;

"(d) any person who is recorded on the child's birth certificate as the child's father;

"(e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;

"(f) any person who has been identified as the child's father by the mother in written, sworn statement; and

"(g) any person who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b of the social services law.

"3. The sole purpose of notice under this section shall be to enable the person served pursuant to subdivision two to present evidence to the court relevant to the best interests of the child."

order staying appellant's paternity proceeding until he could rule on a motion to change the venue of that proceeding to Ulster County. On March 3, 1979, appellant received notice of the change of venue motion and, for the first time, learned that an adoption proceeding was pending in Ulster County.

On March 7, 1979, appellant's attorney telephoned the Ulster County judge to inform him that he planned to seek a stay of the adoption proceeding pending the determination of the paternity petition. In that telephone conversation, the judge advised the lawyer that he had already signed the adoption order earlier that day. According to appellant's attorney, the judge stated that he was aware of the pending paternity petition but did not believe he was required to give notice to appellant prior to the entry of the order of adoption.

Thereafter, the Family Court in Westchester County granted appellee's motion to dismiss the paternity petition, holding that the putative father's right to seek paternity "must be deemed severed so long as an order of adoption exists." App. 228. Appellant did not appeal from that dismissal.[6] On June 22, 1979, appellant filed a petition to vacate the order of adoption on the ground that it was obtained by fraud and in violation of his constitutional rights. The Ulster County Family Court received written and oral argument on the question whether it had "dropped the ball" by approving the adoption without giving appellant advance notice. Tr. 53. After deliberating for several months, it denied the petition, explaining its decision in a thorough written opinion. *In re Adoption of Martz*, 102 Misc. 2d 102, 423 N. Y. S. 2d 378 (1979).

The Appellate Division of the Supreme Court affirmed. *In re Adoption of Jessica "XX,"* 77 App. Div. 2d 381, 434 N. Y. S. 2d 772 (1980). The majority held that appellant's commencement of a paternity action did not give him any right to receive notice of the adoption proceeding, that the notice provisions of the statute were constitutional, and that *Caban* v. *Mohammed*, 441 U. S. 380 (1979), was not retroactive.[7] Parenthetically, the majority observed that appellant "could have insured his right to notice by signing the putative father registry." 77 App. Div. 2d, at 383, 434 N. Y. S. 2d, at 774. One justice dissented on the ground that the filing of the paternity proceeding should have been viewed as the statutory equivalent of filing a notice of intent to claim paternity with the putative father registry.

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[6] Without trying to intervene in the adoption proceeding, appellant had attempted to file an appeal from the adoption order. That appeal was dismissed.

The New York Court of Appeals also affirmed by a divided vote. *In re Adoption of Jessica "XX,"* 54 N. Y. 2d 417, 430 N. E. 2d 896 (1981). The majority first held that it did not need to consider whether our decision in *Caban* affected appellant's claim that he had a right to notice, because *Caban* was not retroactive.[8] It then rejected the argument that the mother had been guilty of a fraud upon the court. Finally, it addressed what it described as the only contention of substance advanced by appellant: that it was an abuse of discretion to enter the adoption order without requiring that notice be given to appellant. The court observed that the primary purpose of the notice provision of § 111–a was to enable the person served to provide the court with evidence concerning the best interest of the child, and that appellant had made no tender indicating any ability to provide any particular or special information relevant to Jessica's best interest. Considering the record as a whole, and acknowledging that it might have been prudent to give notice, the court concluded that the Family Court had not abused its discretion either when it entered the order without notice or when it denied appellant's petition to reopen the proceedings. The dissenting judges concluded that the Family Court had abused its discretion, both when it entered the order without notice and when it refused to reopen the proceedings.

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[7] *Caban* was decided on April 24, 1979, about two months after the entry of the order of adoption. In *Caban*, a father who had lived with his two illegitimate children and their mother for several years successfully challenged the constitutionality of the New York statute providing that children could be adopted without the father's consent even though the mother's consent was required.

[8] Although the dissenters in *Caban* discussed the question of retroactivity, see 441 U. S., at 401, 415–416, that question was not addressed in the Court's opinion.

Appellant has now invoked our appellate jurisdiction.[9] He offers two alternative grounds for holding the New York statutory scheme unconstitutional. First, he contends that a putative father's actual or potential relationship with a child born out of wedlock is an interest in liberty which may not be destroyed without due process of law; he argues therefore that he had a constitutional right to prior notice and an opportunity to be heard before he was deprived of that interest. Second, he contends that the gender-based classification in the statute, which both denied him the right to consent to Jessica's adoption and accorded him fewer procedural rights than her mother, violated the Equal Protection Clause.[10]

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[9] We postponed consideration of our jurisdiction until after hearing argument on the merits. 456 U. S. 970 (1982). Our review of the record persuades us that appellant did in fact draw into question the validity of the New York statutory scheme on the ground of its being repugnant to the Federal Constitution, that the New York Court of Appeals upheld that scheme, and that we therefore have jurisdiction pursuant to 28 U. S. C. § 1257(2).

[10] The question whether the Family Court abused its discretion in not requiring notice to appellant before the adoption order was entered and in not reopening the proceeding is, of course, not before us. That issue was presented to and decided by the New York courts purely as a matter of state law. Whether we might have given such notice had we been sitting as the trial court, or whether we might have considered the failure to give such notice an abuse of discretion had we been sitting as state appellate judges, are questions on which we are not authorized to express an opinion. The only question we have jurisdiction to decide is whether the New York statutes are unconstitutional because they inadequately protect the natural relationship between parent and child or because they draw an impermissible distinction between the rights of the mother and the rights of the father.

The Due Process Claim.

The Fourteenth Amendment provides that no State shall deprive any person of life, liberty, or property without due process of law. When that Clause is invoked in a novel context, it is our practice to begin the inquiry with a determination of the precise nature of the private interest that is threatened by the State. See, *e. g.*, *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895–896 (1961). Only after that interest has been identified, can we properly evaluate the adequacy of the State's process. See *Morrissey* v. *Brewer*, 408 U. S. 471, 482–483 (1972). We therefore first consider the nature of the interest in liberty for which appellant claims constitutional protection and then turn to a discussion of the adequacy of the procedure that New York has provided for its protection.

I

The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases. In deciding whether this is such a case, however, we must consider the broad framework that has traditionally been used to resolve the legal problems arising from the parent-child relationship.

In the vast majority of cases, state law determines the final outcome. Cf. *United States* v. *Yazell*, 382 U. S. 341, 351–353 (1966). Rules governing the inheritance of property, adoption, and child custody are generally specified in statutory enactments that vary from State to State.[11] Moreover, equally varied state laws governing marriage and divorce affect a multitude of parent-child relationships. The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society.[12] In recognition of that role, and as part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family.[13]

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[11] At present, state legislatures appear inclined to retain the unique attributes of their respective bodies of family law. For example, as of the end of 1982, only eight States had adopted the Uniform Parentage Act. 9A U. L. A. 171 (Supp. 1983).

In some cases, however, this Court has held that the Federal Constitution supersedes state law and provides even greater protection for certain formal family relationships. In those cases, as in the state cases, the Court has emphasized the paramount interest in the welfare of children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed. Thus, the "liberty" of parents to control the education of their children that was vindicated in *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), and *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), was described as a "right, coupled with the high duty, to recognize and prepare [the child] for additional obligations." *Id.*, at 535. The linkage between parental duty and parental right was stressed again in *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944), when the Court declared it a cardinal principle "that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Ibid.* In these cases the Court has found that the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection. See also *Moore* v. *City of East Cleveland*, 431 U. S. 494 (1977) (plurality opinion). "[S]tate intervention to terminate [such a] relationship . . . must be accomplished by procedures meeting the requisites of the Due Process Clause." *Santosky* v. *Kramer*, 455 U. S. 745, 753 (1982).

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[12] See Hafen, Marriage, Kinship, and Sexual Privacy, 81 Mich. L. Rev. 463, 479–481 (1983).

[13] See *Trimble* v. *Gordon*, 430 U. S. 762, 769 (1977) ("No one disputes the appropriateness of Illinois' concern with the family unit, perhaps the most fundamental social institution of our society"). A plurality of the Court noted the societal value of family bonds in *Moore* v. *City of East Cleveland*, 431 U. S. 494, 505 (1977) (opinion of POWELL, J.):

"Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home. . . . Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life."

There are also a few cases in which this Court has considered the extent to which the Constitution affords protection to the relationship between natural parents and children born out of wedlock. In some we have been concerned with the rights of the children, see, *e. g., Trimble* v. *Gordon*, 430 U. S. 762 (1977); *Jimenez* v. *Weinberger*, 417 U. S. 628 (1974); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972). In this case, however, it is a parent who claims that the State has improperly deprived him of a protected interest in liberty. This Court has examined the extent to which a natural father's biological relationship with his child receives protection under the Due Process Clause in precisely three cases: *Stanley* v. *Illinois*, 405 U. S. 645 (1972), *Quilloin* v. *Walcott*, 434 U. S. 246 (1978), and *Caban* v. *Mohammed*, 441 U. S. 380 (1979).

Stanley involved the constitutionality of an Illinois statute that conclusively presumed every father of a child born out of wedlock to be an unfit person to have custody of his children. The father in that case had lived with his children all their lives and had lived with their mother for 18 years. There was nothing in the record to indicate that Stanley had been a neglectful father who had not cared for his children. 405 U. S., at 655. Under the statute, however, the nature of the actual relationship between parent and child was completely irrelevant. Once the mother died, the children were automatically made wards of the State. Relying in part on a

Michigan case[14] recognizing that the preservation of "a subsisting relationship with the child's father" may better serve the child's best interest than "uprooting him from the family which he knew from birth," *id.*, at 654–655, n. 7, the Court held that the Due Process Clause was violated by the automatic destruction of the custodial relationship without giving the father any opportunity to present evidence regarding his fitness as a parent.[15]

Quilloin involved the constitutionality of a Georgia statute that authorized the adoption, over the objection of the natural father, of a child born out of wedlock. The father in that case had never legitimated the child. It was only after the mother had remarried and her new husband had filed an adoption petition that the natural father sought visitation rights and filed a petition for legitimation. The trial court found adoption by the new husband to be in the child's best interests, and we unanimously held that action to be consistent with the Due Process Clause.

Caban involved the conflicting claims of two natural parents who had maintained joint custody of their children from the time of their birth until they were respectively two and four years old. The father challenged the validity of an order authorizing the mother's new husband to adopt the children; he relied on both the Equal Protection Clause and the Due Process Clause. Because this Court upheld his equal protection claim, the majority did not address his due process challenge. The comments on the latter claim by the four dissenting Justices are nevertheless instructive, because they identify the clear distinction between a mere biological relationship and an actual relationship of parental responsibility.

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[14] *In re Mark T.*, 8 Mich. App. 122, 154 N. W. 2d 27 (1967).

[15] Having "concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody," the Court also held "that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause." 405 U. S., at 658.

Justice Stewart correctly observed:

> "Even if it be assumed that each married parent after divorce has some substantive due process right to maintain his or her parental relationship, cf. *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 862–863 (opinion concurring in judgment), it by no means follows that each unwed parent has any such right. *Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.*" 441 U. S., at 397 (emphasis added).[16]

In a similar vein, the other three dissenters in *Caban* were prepared to "assume that, *if and when one develops*, the relationship between a father and his natural child is entitled to protection against arbitrary state action as a matter of due process." *Caban* v. *Mohammed*, *supra*, at 414 (emphasis added).

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[16] In the balance of that paragraph Justice Stewart noted that the relation between a father and his natural child may acquire constitutional protection if the father enters into a traditional marriage with the mother or if "the actual relationship between father and child" is sufficient.

"The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures. By tradition, the primary measure has been the legitimate familial relationship he creates with the child by marriage with the mother. By definition, the question before us can arise only when no such marriage has taken place. In some circumstances the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father. Cf. *Stanley* v. *Illinois*, *supra*. But here we are concerned with the rights the unwed father may have when his wishes and those of the mother are in conflict, and the child's best interests are served by a resolution in favor of the mother. It seems to me that the absence of a legal tie with the mother may in such circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist by virtue of the father's actual relationship with the children." 441 U. S., at 397.

The difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* and this case, is both clear and significant. When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," *Caban*, 441 U. S., at 392, his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children." *Id.*, at 389, n. 7. But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . as well as from the fact of blood relationship." *Smith* v. *Organization of Foster Families for Equality and Reform*, 431 U. S. 816, 844 (1977) (quoting *Wisconsin* v. *Yoder*, 406 U. S. 205, 231–233 (1972)).[17]

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[17] Commentators have emphasized the constitutional importance of the distinction between an inchoate and a fully developed relationship. See Comment, 46 Brooklyn L. Rev. 95, 115–116 (1979) ("the unwed father's interest springs not from his biological tie with his illegitimate child, but rather, from the relationship he has established with and the responsibility he has shouldered for his child"); Note, 58 Neb. L. Rev. 610, 617 (1979) ("a putative father's failure to show a substantial interest in his child's welfare and to employ methods provided by state law for solidifying his parental rights . . . will remove from him the full constitutional protection afforded the parental rights of other classes of parents"); Note, 29 Emory L. J. 833, 854 (1980) ("an unwed father's rights in his child do not spring solely from the biological fact of his parentage, but rather from his willingness to admit his paternity and express some tangible interest in the child"). See also Poulin, Illegitimacy and Family Privacy: A Note on Maternal Cooperation in Paternity Suits, 70 Nw. U. L. Rev. 910, 916–919 (1976) (hereinafter Poulin); Developments in the Law, 93 Harv. L. Rev. 1156, 1275–1277 (1980); Note, 18 Duquesne L. Rev. 375, 383–384, n. 73 (1980); Note, 19 J. Family L. 440, 460 (1980); Note, 57 Denver L. J. 671, 680–683 (1980);

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development.[18] If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

In this case, we are not assessing the constitutional adequacy of New York's procedures for terminating a developed relationship. Appellant has never had any significant custodial, personal, or financial relationship with Jessica, and he did not seek to establish a legal tie until after she was two years old.[19] We are concerned only with whether New York

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Note, 1979 Wash. U. L. Q. 1029, 1035; Note, 12 U. C. D. L. Rev. 412, 450, n. 218 (1979).

[18] Of course, we need not take sides in the ongoing debate among family psychologists over the relative weight to be accorded biological ties and psychological ties, in order to recognize that a natural father who has played a substantial role in rearing his child has a greater claim to constitutional protection than a mere biological parent. New York's statutory scheme reflects these differences, guaranteeing notice to any putative father who is living openly with the child, and providing putative fathers who have never developed a relationship with the child the opportunity to receive notice simply by mailing a postcard to the putative father registry.

[19] This case happens to involve an adoption by the husband of the natural mother, but we do not believe the natural father has any greater right to object to such an adoption than to an adoption by two total strangers. If anything, the balance of equities tips the opposite way in a case such as this. In denying the putative father relief in *Quilloin* v. *Walcott*, 434 U. S. 246 (1978), we made an observation equally applicable here:

"Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than has adequately protected his opportunity to form such a relationship.

II

The most effective protection of the putative father's opportunity to develop a relationship with his child is provided by the laws that authorize formal marriage and govern its consequences. But the availability of that protection is, of course, dependent on the will of both parents of the child. Thus, New York has adopted a special statutory scheme to protect the unmarried father's interest in assuming a responsible role in the future of his child.

After this Court's decision in *Stanley*, the New York Legislature appointed a special commission to recommend legislation that would accommodate both the interests of biological fathers in their children and the children's interest in prompt and certain adoption procedures. The commission recommended, and the legislature enacted, a statutory adoption scheme that automatically provides notice to seven categories of putative fathers who are likely to have assumed some responsibility for the care of their natural children.[20] If

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that the adoption, and denial of legitimation, were in the 'best interests of the child.'" *Id.*, at 255.

[20] In a report explaining the purpose of the 1976 amendments to § 111–a of the New York Domestic Relations Law, the temporary state commission on child welfare that was responsible for drafting the legislation stated, in part:

"The measure will dispel uncertainties by providing clear constitutional statutory guidelines for notice to fathers of out-of-wedlock children. It will establish a desired finality in adoption proceedings and will provide an expeditious method for child placement agencies of identifying those fathers who are entitled to notice through the creation of a registry of such fathers within the State Department of Social Services. Conversely, the bill will afford to concerned fathers of out-of-wedlock children a simple means of expressing their interest and protecting their rights to be notified and have an opportunity to be heard. It will also obviate an existing disparity of Appellate Division decisions by permitting such fathers to be petitioners in paternity proceedings.

"The measure is intended to codify the minimum protections for the putative father which *Stanley* would require. In so doing it reflects policy this scheme were likely to omit many responsible fathers, and if qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate. Yet, as all of the New York courts that reviewed this matter observed, the right to receive notice was completely within appellant's control. By mailing a postcard to the putative father registry, he could have guaranteed that he would receive notice of any proceedings to adopt Jessica. The possibility that he may have failed to do so because of his ignorance of the law cannot be a sufficient reason for criticizing the law itself. The New York Legislature concluded that a more open-ended notice requirement would merely complicate the adoption process, threaten the privacy interests of unwed mothers,[21] create the risk of unnecessary controversy, and impair the desired finality of adoption decrees. Regardless of whether we would have done likewise if we were legislators instead of judges, we surely cannot characterize the State's conclusion as arbitrary.[22]

Appellant argues, however, that even if the putative father's opportunity to establish a relationship with an illegitimate child is adequately protected by the New York statutory scheme in the normal case, he was nevertheless entitled

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decisions to (a) codify constitutional requirements; (b) clearly establish, as early as possible in a child's life, the rights, interests and obligations of all parties; (c) facilitate prompt planning for the future of the child and permanence of his status; and (d) through the foregoing, promote the best interest of children." App. to Brief for Appellant C-15.

[21] Cf. *Roe* v. *Norton*, 422 U. S. 391 (1975), vacating and remanding 365 F. Supp. 65 (Conn. 1973). See Poulin 922–932; Barron, Notice to the Unwed Father and Termination of Parental Rights, 9 Family L. Q. 527, 542 (1975).

[22] Nor can we deem unconstitutionally arbitrary the state courts' conclusion that appellant's absence did not distort their analysis of Jessica's best interests. The adoption does not affect Jessica's relationship with her mother. It gives legal permanence to her relationship with her adoptive father, a relationship they had maintained for 21 months at the time the adoption order was entered. Appellant did not proffer any evidence to suggest that legal confirmation of the established relationship would be unwise; he did not even know the adoptive father.

to special notice because the court and the mother knew that he had filed an affiliation proceeding in another court. This argument amounts to nothing more than an indirect attack on the notice provisions of the New York statute. The legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously that underlie the entire statutory scheme also justify a trial judge's determination to require all interested parties to adhere precisely to the procedural requirements of the statute. The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights.[23] Since the New York statutes adequately protected appellant's inchoate interest in establishing a relationship with Jessica, we find no merit in the claim that his constitutional rights were offended because the Family Court strictly complied with the notice provisions of the statute.

The Equal Protection Claim.

The concept of equal justice under law requires the State to govern impartially. *New York City Transit Authority* v. *Beazer*, 440 U. S. 568, 587 (1979). The sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective. *Reed* v. *Reed*, 404 U. S. 71, 76 (1971).[24] Specifically, it may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state purpose. *Ibid.; Craig* v. *Boren*, 429 U. S. 190, 197–199 (1976).

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[23] It is a generally accepted feature of our adversary system that a potential defendant who knows that the statute of limitations is about to run has no duty to give the plaintiff advice. There is no suggestion in the record that appellee engaged in fraudulent practices that led appellant not to protect his rights.

[24] In *Reed*, the Court considered an Idaho statute providing that in designating administrators of the estates of intestate decedents, "[o]f several persons claiming and equally entitled to administer, males must be preferred to females." See 404 U. S., at 73. The State had sought to justify the statute as a way to reduce the workload of probate courts by eliminating one class of contests. Writing for a unanimous Court, THE CHIEF JUSTICE observed that in using gender to promote that objective, the legisla-

The legislation at issue in this case, N. Y. Dom. Rel. Law §§ 111 and 111–a (McKinney 1977 and Supp. 1982–1983), is intended to establish procedures for adoptions. Those procedures are designed to promote the best interests of the child, to protect the rights of interested third parties, and to ensure promptness and finality.[25] To serve those ends, the legislation guarantees to certain people the right to veto an adoption and the right to prior notice of any adoption proceeding. The mother of an illegitimate child is always within that favored class, but only certain putative fathers are included. Appellant contends that the gender-based distinction is invidious.

As we have already explained, the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the

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ture had made "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause." *Id.*, at 76. The State's articulated goal could have been completely served by requiring a coin flip. The decision instead to choose a rule that systematically harmed women could be explained only as the product of habit, rather than analysis or reflection, cf. *Califano* v. *Goldfarb*, 430 U. S. 199, 222 (1977) (STEVENS, J., concurring in judgment), or as the product of an invidious and indefensible stereotype, cf. *id.*, at 218. Such legislative decisions are inimical to the norm of impartial government.

The mandate of impartiality also constrains those state actors who implement state laws. Thus, the Equal Protection Clause would have been violated in precisely the same manner if in *Reed* there had been no statute and the probate judge had simply announced that he chose Cecil Reed over Sally Reed "because I prefer males to females."

[25] Appellant does not contest the vital importance of those ends to the people of New York. It has long been accepted that illegitimate children whose parents never marry are "at risk" economically, medically, emotionally, and educationally. See E. Crellin, M. Pringle, & P. West, Born Illegitimate: Social and Educational Implications 96–112 (1971); cf. T. Lash, H. Sigal, & D. Dudzinski, State of the Child: New York City II, p. 47 (1980).

parent and the best interests of the child. In *Quilloin* v. *Walcott*, we noted that the putative father, like appellant, "ha[d] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities . . . ." 434 U. S., at 256. We therefore found that a Georgia statute that always required a mother's consent to the adoption of a child born out of wedlock, but required the father's consent only if he had legitimated the child, did not violate the Equal Protection Clause. Because appellant, like the father in *Quilloin*, has never established a substantial relationship with his daughter, see *supra*, at 262, the New York statutes at issue in this case did not operate to deny appellant equal protection.

We have held that these statutes may not constitutionally be applied in that class of cases where the mother and father are in fact similarly situated with regard to their relationship with the child. In *Caban* v. *Mohammed*, 441 U. S. 380 (1979), the Court held that it violated the Equal Protection Clause to grant the mother a veto over the adoption of a 4-year-old girl and a 6-year-old boy, but not to grant a veto to their father, who had admitted paternity and had participated in the rearing of the children. The Court made it clear, however, that if the father had not "come forward to participate in the rearing of his child, nothing in the Equal Protection Clause [would] preclud[e] the State from withholding from him the privilege of vetoing the adoption of that child." *Id.*, at 392.

Jessica's parents are not like the parents involved in *Caban*. Whereas appellee had a continuous custodial responsibility for Jessica, appellant never established any custodial, personal, or financial relationship with her. If one parent has an established custodial relationship with the child and the other parent has either abandoned[26] or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights.[27]

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[26] In *Caban*, the Court noted that an adoption "may proceed in the absence of consent when the parent whose consent otherwise would be required . . . has abandoned the child." 441 U. S., at 392.

The judgment of the New York Court of Appeals is

Affirmed.

JUSTICE WHITE, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

The question in this case is whether the State may, consistent with the Due Process Clause, deny notice and an opportunity to be heard in an adoption proceeding to a putative father when the State has actual notice of his existence, whereabouts, and interest in the child.

I

It is axiomatic that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge*, 424 U. S. 319, 333 (1976), quoting *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965). As Jessica's biological father, Lehr either had an interest protected by the Constitution or he did not.[1] If the entry of the adoption order in this case deprived Lehr of a constitutionally protected interest, he is entitled to notice and an opportunity to be heard before the order can be accorded finality.

According to Lehr, he and Jessica's mother met in 1971 and began living together in 1974. The couple cohabited for approximately two years, until Jessica's birth in 1976. Throughout the pregnancy and after the birth, Lorraine acknowledged to friends and relatives that Lehr was Jessica's father; Lorraine told Lehr that she had reported to the New York State Department of Social Services that he was the father.[2] Lehr visited Lorraine and Jessica in the hospital every day during Lorraine's confinement. According to Lehr, from the time Lorraine was discharged from the hospital until August 1978, she concealed her whereabouts from him. During this time Lehr never ceased his efforts to locate Lorraine and Jessica and achieved sporadic success until August 1977, after which time he was unable to locate them at all. On those occasions when he did determine Lorraine's location, he visited with her and her children to the extent she was willing to permit it. When Lehr, with the aid of a detective agency, located Lorraine and Jessica in August 1978, Lorraine was already married to Mr. Robertson. Lehr asserts that at this time he offered to provide financial assistance and to set up a trust fund for Jessica, but that Lorraine refused. Lorraine threatened Lehr with arrest unless he stayed away and refused to permit him to see Jessica. Thereafter Lehr retained counsel who wrote to Lorraine in early December 1978, requesting that she permit Lehr to visit Jessica and threatening legal action on Lehr's behalf. On December 21, 1978, perhaps as a response to Lehr's threatened legal action, appellees commenced the adoption action at issue here.

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[27] Appellant also makes an equal protection argument based upon the manner in which the statute distinguishes among classes of fathers. For the reasons set forth in our due process discussion, *supra*, we conclude that the statutory distinction is rational and that appellant's argument is without merit.

[1] The majority correctly assumes that Lehr is in fact Jessica's father. Indeed, Lehr has admitted paternity and sought to establish a legal relationship with the child. It is also noteworthy that the mother has never denied that Lehr is the father.

The majority posits that "[t]he intangible fibers that connect parent and child . . . are sufficiently vital to merit constitutional protection *in appropriate cases.*" *Ante,* at 256

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[2] Under 18 NYCRR § 369.2(b) (1982), recipients of public assistance in the Aid to Families with Dependent Children program are required as a condition of eligibility to provide the name and address of the child's father. Lorraine apparently received public assistance after Jessica's birth; it is unclear whether she received public assistance after that regulation went into effect in 1977.

(emphasis added). It then purports to analyze the particular facts of this case to determine whether appellant has a constitutionally protected liberty interest. We have expressly rejected that approach. In *Board of Regents* v. *Roth*, 408 U. S. 564, 570–571 (1972), we stated that although "a weighing process has long been a part of any determination of the *form* of hearing required in particular situations . . . to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake . . . to see if the interest is within the Fourteenth Amendment's protection . . . ." See, *e. g.*, *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 839–842 (1977); *Ingraham* v. *Wright*, 430 U. S. 651, 672 (1977); *Meachum* v. *Fano*, 427 U. S. 215, 224 (1976); *Goss* v. *Lopez*, 419 U. S. 565, 575–576 (1975); *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972).

The "nature of the interest" at stake here is the interest that a natural parent has in his or her child, one that has long been recognized and accorded constitutional protection. We have frequently "stressed the importance of familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection." *Little* v. *Streater*, 452 U. S. 1, 13 (1981). If "both the child and the [putative father] in a paternity action have a compelling interest" in the accurate outcome of such a case, *ibid.*, it cannot be disputed that both the child and the putative father have a compelling interest in the outcome of a proceeding that may result in the termination of the father-child relationship. "A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one." *Lassiter* v. *Department of Social Services*, 452 U. S. 18, 27 (1981). It is beyond dispute that a formal order of adoption, no less than a formal termination proceeding, operates to permanently terminate parental rights.

Lehr's version of the "facts" paints a far different picture than that portrayed by the majority. The majority's recitation, that "[a]ppellant has never had any significant custodial, personal, or financial relationship with Jessica, and he did not seek to establish a legal tie until after she was two years old," *ante*, at 262, obviously does not tell the whole story. Appellant has never been afforded an opportunity to present his case. The legitimation proceeding he instituted was first stayed, and then dismissed, on appellees' motions. Nor could appellant establish his interest during the adoption proceedings, for it is the failure to provide Lehr notice and an opportunity to be heard there that is at issue here. We cannot fairly make a judgment based on the quality or substance of a relationship without a complete and developed factual record. This case requires us to assume that Lehr's allegations are true—that but for the actions of the child's mother there would have been the kind of significant relationship that the majority concedes is entitled to the full panoply of procedural due process protections.[3]

I reject the peculiar notion that the only significance of the biological connection between father and child is that "it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring." *Ante*, at 262. A "mere biological relationship" is not as unimportant in determining the nature of liberty interests as the majority suggests.

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[3] In response to our decision in *Caban* v. *Mohammed*, 441 U. S. 380 (1979), the statute governing the persons whose consent is necessary to an adoption has been amended to include certain unwed fathers. The State has recognized that an unwed father's failure to maintain an actual relationship or to communicate with a child will not deprive him of his right to consent if he was "prevented from doing so by the person or authorized agency having lawful custody of the child." N. Y. Dom. Rel. Law § 111(1)(d) (McKinney Supp. 1982–1983) (as amended by Ch. 575, 1980 N. Y. Laws). Thus, even the State recognizes that before a lesser standard can be applied consistent with due process requirements, there must be a determination that there was no significant relationship and that the father was not prevented from forming such a relationship.

"[T]he usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element." *Smith* v. *Organization of Foster Families*, *supra*, at 843. The "biological connection" is itself a relationship that creates a protected interest. Thus the "nature" of the interest is the parent-child relationship; how well developed that relationship has become goes to its "weight," not its "nature."[4] Whether Lehr's interest is entitled to constitutional protection does not entail a searching inquiry into the quality of the relationship but a simple determination of the *fact* that the relationship exists—a fact that even the majority agrees must be assumed to be established.

Beyond that, however, because there is no established factual basis on which to proceed, it is quite untenable to conclude that a putative father's interest in his child is lacking in substance, that the father in effect has abandoned the child, or ultimately that the father's interest is not entitled to the same minimum procedural protections as the interests of other putative fathers. Any analysis of the adequacy of the notice in this case must be conducted on the assumption that the interest involved here is as strong as that of *any* putative father. That is not to say that due process requires actual notice to every putative father or that adoptive parents or the State must conduct an exhaustive search of records or an intensive investigation before a final adoption order may be entered. The procedures adopted by the State, however, must at least represent a reasonable effort to determine the identity of the putative father and to give him adequate notice.

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[4] The majority's citation of *Quilloin* and *Caban* as examples that the Constitution does not require the same procedural protections for the interests of all unwed fathers is disingenuous. Neither case involved notice and opportunity to be heard. In both, the unwed fathers were notified and participated as parties in the adoption proceedings. See *Quilloin* v. *Walcott*, 434 U. S. 246, 253 (1978); *Caban* v. *Mohammed*, 441 U. S. 380, 385, n. 3 (1979).

II

In this case, of course, there was no question about either the identity or the location of the putative father. The mother knew exactly who he was and both she and the court entering the order of adoption knew precisely where he was and how to give him actual notice that his parental rights were about to be terminated by an adoption order.[5] Lehr was entitled to due process, and the right to be heard is one of the fundamentals of that right, which "'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.'" *Schroeder* v. *City of New York*, 371 U. S. 208, 212 (1962), quoting *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 314 (1950).

The State concedes this much but insists that Lehr has had all the process that is due to him. It relies on § 111–a, which designates seven categories of unwed fathers to whom notice of adoption proceedings must be given, including any unwed father who has filed with the State a notice of his intent to claim paternity. The State submits that it need not give notice to anyone who has not filed his name, as he is permitted to do, and who is not otherwise within the designated categories, even if his identity and interest are known or are reasonably ascertainable by the State.

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[5] Absent special circumstances, there is no bar to requiring the mother of an illegitimate child to divulge the name of the father when the proceedings at issue involve the permanent termination of the father's rights. Likewise, there is no reason not to require such identification when it is the spouse of the custodial parent who seeks to adopt the child. Indeed, the State now requires the mother to provide the identity of the father if she applies for financial benefits under the Aid to Families with Dependent Children Program. See n. 2, *supra*. The State's obligation to provide notice to persons before their interests are permanently terminated cannot be a lesser concern than its obligation to assure that state funds are not expended when there exists a person upon whom the financial responsibility should fall.

I am unpersuaded by the State's position. In the first place, § 111–a defines six categories of unwed fathers to whom notice must be given even though they have not placed their names on file pursuant to the section. Those six categories, however, do not include fathers such as Lehr who have initiated filiation proceedings, even though their identity and interest are as clearly and easily ascertainable as those fathers in the six categories. Initiating such proceedings necessarily involves a formal acknowledgment of paternity, and requiring the State to take note of such a case in connection with pending adoption proceedings would be a trifling burden, no more than the State undertakes when there is a final adjudication in a paternity action.[6] Indeed, there would appear to be more reason to give notice to those such as Lehr who acknowledge paternity than to those who have been adjudged to be a father in a contested paternity action.

The State asserts that any problem in this respect is overcome by the seventh category of putative fathers to whom notice must be given, namely, those fathers who have identified themselves in the putative fathers' register maintained by the State. Since Lehr did not take advantage of this device to make his interest known, the State contends, he was not entitled to notice and a hearing even though his identity, location, and interest were known to the adoption court prior to entry of the adoption order. I have difficulty with this position. First, it represents a grudging and crabbed approach to due process. The State is quite willing to give notice and a hearing to putative fathers who have made themselves known by resorting to the putative fathers' register. It makes little sense to me to deny notice and hearing to a father who has not placed his name in the register but who has unmistakably identified himself by filing suit to establish his paternity and has notified the adoption court of his action and his interest. I thus need not question the statutory scheme on its face. Even assuming that Lehr would have been foreclosed if his failure to utilize the register had somehow disadvantaged the State, he effectively made himself known by other means, and it is the sheerest formalism to deny him a hearing because he informed the State in the wrong manner.[7]

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[6] There is some indication that the sponsor of the bill that included the notice requirements of § 111–a believed that a putative father's rights would be protected by the filing of a paternity action. In a letter to the Counsel to the Governor, Senator Pisani stated that a putative father who files with the registry should be expected to keep his address up-to-date because "such a father has elected not to avail himself of his right . . . to initiate a paternity proceeding, but, rather, has chosen the less involved procedure of filing a 'notice of intent' which will *also* protect his right to notice of subsequent proceedings affecting the child." App. to Brief for Attorney General of New York 35a (emphasis added).

No state interest is substantially served by denying Lehr adequate notice and a hearing. The State no doubt has an interest in expediting adoption proceedings to prevent a child from remaining unduly long in the custody of the State or foster parents. But this is not an adoption involving a child in the custody of an authorized state agency. Here the child is in the custody of the mother and will remain in her custody. Moreover, had Lehr utilized the putative fathers' register, he would have been granted a prompt hearing, and there was no justifiable reason, in terms of delay, to refuse him a hearing in the circumstances of this case.

The State's undoubted interest in the finality of adoption orders likewise is not well served by a procedure that will deny notice and a hearing to a father whose identity and location are known. As this case well illustrates, denying notice and a hearing to such a father may result in years of additional litigation and threaten the reopening of adoption proceedings and the vacation of the adoption. Here, the Family Court's unseemly rush to enter an adoption order after ordering that cause be shown why the filiation proceeding should not be transferred and consolidated with the adoption proceeding can hardly be justified by the interest in finality. To the contrary, the adoption order entered in March 1979 has remained open to question until this very day.

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[7] In *Stanley* v. *Illinois*, 405 U. S. 645 (1972), the Court held that the Constitution forbids a State to remove illegitimate children from their father's custody without notice and an opportunity to be heard. The offensive provision in the Illinois law at issue there was a presumption that an unwed father was not a fit parent. Today the Court indulges in a similar and equally offensive presumption—that an unwed father who has not filed a notice of intent to claim paternity has abandoned his child and waived any right to notice and hearing. This presumption operates regardless of the fact that the father has instituted legal proceedings to establish his rights and obligations.

Because in my view the failure to provide Lehr with notice and an opportunity to be heard violated rights guaranteed him by the Due Process Clause, I need not address the question whether § 111–a violates the Equal Protection Clause by discriminating between categories of unwed fathers or by discriminating on the basis of gender.

Respectfully, I dissent.

SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY v. HELM

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82-492. Argued March 29, 1983—Decided June 28, 1983

In 1979, respondent was convicted in a South Dakota state court of uttering a "no account" check for $100. Ordinarily the maximum punishment for that crime would have been five years' imprisonment and a $5,000 fine. Respondent, however, was sentenced to life imprisonment without possibility of parole under South Dakota's recidivist statute because of his six prior felony convictions—three convictions for third-degree burglary and convictions for obtaining money under false pretenses, grand larceny, and third-offense driving while intoxicated. The South Dakota Supreme Court affirmed the sentence. After respondent's request for commutation was denied, he sought habeas relief in Federal District Court, contending that his sentence constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. The District Court denied relief, but the Court of Appeals reversed.

Held:

1. The Eighth Amendment's proscription of cruel and unusual punishments prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed. Pp. 284–290.

(a) The principle of proportionality is deeply rooted in common-law jurisprudence. It was expressed in Magna Carta, applied by the English courts for centuries, and repeated in the English Bill of Rights in language that was adopted in the Eighth Amendment. When the Framers of the Eighth Amendment adopted this language, they adopted the principle of proportionality that was implicit in it. Pp. 284–286.

(b) The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century. In several cases the Court has applied the principle to invalidate criminal sentences. *E. g.*, *Weems* v. *United States*, 217 U. S. 349. And the Court often has recognized that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription. Pp. 286–288.

(c) There is no basis for the State's assertion that the principle of proportionality does not apply to felony prison sentences. Neither the text of the Eighth Amendment nor the history behind it supports such an exception. Moreover, this Court's cases have recognized explicitly that prison sentences are subject to proportionality analysis. No penalty is *per se* constitutional. Pp. 288–290.

2. A court's proportionality analysis under the Eighth Amendment should be guided by objective criteria. Pp. 290–295.

(a) Criteria that have been recognized in this Court's prior cases include (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction, that is, whether more serious crimes are subject to the same penalty or to less serious penalties; and (iii) the sentences imposed for commission of the same crime in other jurisdictions. Pp. 290–292.

(b) Courts are competent to judge the gravity of an offense, at least on a relative scale. Comparisons can be made in light of the harm caused or threatened to the victim or to society, and the culpability of the offender. There are generally accepted criteria for comparing the severity of different crimes, despite the difficulties courts face in attempting to draw distinctions between similar crimes. Pp. 292–294.

(c) Courts are also able to compare different sentences. For sentences of imprisonment, the problem is one of line-drawing. Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts. Cf. *Barker* v. *Wingo*, 407 U. S. 514; *Baldwin* v. *New York*, 399 U. S. 66. Pp. 294–295.

3. In light of the relevant objective criteria, respondent's sentence of life imprisonment without possibility of parole is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment. Pp. 295–303.

(a) Respondent's crime of uttering a "no account" check for $100 is viewed by society as among the less serious offenses. It involved neither violence nor threat of violence, and the face value of the check was not a large amount. Respondent's prior felonies were also relatively minor. All were nonviolent and none was a crime against a person. Respondent's sentence was the most severe that the State could have imposed on any criminal for any crime. He has been treated in the same manner as, or more severely than, other criminals in South Dakota who have committed far more serious crimes. Nevada is the only other State that authorizes a life sentence without possibility of parole in the circumstances of this case, and there is no indication that any defendant such as respondent, whose prior offenses were so minor, has received the maximum penalty in Nevada. Pp. 296–300.

(b) The possibility of commutation of a life sentence under South Dakota law is not sufficient to save respondent's otherwise unconstitutional sentence on the asserted theory that this possibility matches the possibility of parole. Assuming good behavior, parole is the normal expectation in the vast majority of cases, and is governed by specified legal standards. Commutation is an ad hoc exercise of executive clemency that may occur at any time for any reason without reference to any standards. In South Dakota, no life sentence has been commuted in over eight years, while parole—where authorized—has been granted regularly during that period. Moreover, even if respondent's sentence were commuted, he merely would be eligible to be considered for parole. *Rummel* v. *Estelle*, 445 U. S. 263, distinguished. Pp. 300–303.

684 F. 2d 582, affirmed.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which WHITE, REHNQUIST, and O'CONNOR, JJ., joined, *post*, p. 304.

Mark V. Meierhenry, Attorney General of South Dakota, argued the cause for petitioner. With him on the briefs was *Grant Gormley*, Assistant Attorney General.

John J. Burnett, by appointment of the Court, 459 U. S. 1100, argued the cause and filed a brief for respondent.

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony.

I

By 1975 the State of South Dakota had convicted respondent Jerry Helm of six nonviolent felonies. In 1964, 1966, and 1969 Helm was convicted of third-degree burglary.[1] In 1972

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[1] In 1969 third-degree burglary was defined in at least two sections of the South Dakota criminal code:

"A person breaking into any dwelling house in the nighttime with intent to commit a crime but under such circumstances as do not constitute burglary in the first degree, is guilty of burglary in the third degree." S. D. Comp. Laws Ann. § 22–32–8 (1967) (repealed 1976).

"A person breaking or entering at any time any building within the curtilage of a dwelling house but not forming a part thereof, or any building or part of any building, booth, tent, railroad car, vessel, vehicle as defined in § 32–14–1, or any structure or erection in which any property is kept, with he was convicted of obtaining money under false pretenses.[2] In 1973 he was convicted of grand larceny.[3] And in 1975 he was convicted of third-offense driving while intoxicated.[4] The record contains no details about the circumstances of any of these offenses, except that they were all nonviolent, none was a crime against a person, and alcohol was a contributing factor in each case.

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intent to commit larceny or any felony, is guilty of burglary in the third degree." S. D. Comp. Laws Ann. § 22-32-9 (1967) (repealed 1976).

In 1964 and 1966 the third-degree burglary definition was essentially the same. See S. D. Code § 13.3703 (1939 ed., Supp. 1960); 1965 S. D. Laws, ch. 32. Third-degree burglary was punishable by "imprisonment in the state penitentiary for any term not exceeding fifteen years." S. D. Comp. Laws Ann. § 22-32-10 (1967) (previously codified at S. D. Code § 13.3705(3) (1939)) (repealed 1976).

[2] In 1972 the relevant statute provided:

"Every person who designedly, by color or aid of any false token or writing, or other false pretense, . . . obtains from any person any money or property . . . is punishable by imprisonment in the state penitentiary not exceeding three years or in a county jail not exceeding one year, or by a fine not exceeding three times the value of the money or property so obtained, or by both such fine and imprisonment." S. D. Comp. Laws Ann. § 22-41-4 (1967) (repealed 1976).

[3] In 1973 South Dakota defined "larceny" as "the taking of personal property accomplished by fraud or stealth and with intent to deprive another thereof." S. D. Comp. Laws Ann. § 22-37-1 (1967) (repealed 1976). Grand larceny and petit larceny were distinguished as follows:

"Grand larceny is larceny committed in any of the following cases:

"(1) When the property taken is of a value exceeding fifty dollars;

"(2) When such property, although not of a value exceeding fifty dollars, is taken from the person of another;

"(3) When such property is livestock.

"Larceny in other cases is petit larceny." S. D. Comp. Laws Ann. § 22-37-2 (1967) (repealed 1976).

Grand larceny was then punishable by "imprisonment in the state penitentiary not exceeding ten years or by imprisonment in the county jail not exceeding one year." S. D. Comp. Laws Ann. § 22-37-3 (1967) (repealed 1976).

[4] A third offense of driving while under the influence of alcohol is a felony in South Dakota. S. D. Codified Laws § 32-23-4 (1976). See 1973 S. D. Laws, ch. 195, § 7 (enacting version of § 32-23-4 in force in 1975).

In 1979 Helm was charged with uttering a "no account" check for $100.[5] The only details we have of the crime are those given by Helm to the state trial court:

> "'I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places.'" *State* v. *Helm*, 287 N. W. 2d 497, 501 (S. D. 1980) (Henderson, J., dissenting) (quoting Helm).

After offering this explanation, Helm pleaded guilty.

Ordinarily the maximum punishment for uttering a "no account" check would have been five years' imprisonment in the state penitentiary and a $5,000 fine. See S. D. Comp. Laws Ann. § 22-6-1(6) (1967 ed., Supp. 1978) (now codified at S. D. Codified Laws § 22-6-1(7) (Supp. 1982)). As a result of his criminal record, however, Helm was subject to South Dakota's recidivist statute:

> "When a defendant has been convicted of at least three prior convictions *[sic]* in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony." S. D. Codified Laws § 22-7-8 (1979) (amended 1981).

The maximum penalty for a "Class 1 felony" was life imprisonment in the state penitentiary and a $25,000 fine.[6] S. D.

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[5] The governing statute provides, in relevant part:

"Any person who, for himself or as an agent or representative of another for present consideration with intent to defraud, passes a check drawn on a financial institution knowing at the time of such passing that he or his principal does not have an account with such financial institution, is guilty of a Class 5 felony." S. D. Codified Laws § 22-41-1.2 (1979).

[6] When Helm was sentenced in April 1979, South Dakota law classified felonies as follows:

"Except as otherwise provided by law, felonies are divided into the following seven classes which are distinguished from each other by the re-

Comp. Laws Ann. § 22-6-1(2) (1967 ed., Supp. 1978) (now codified at S. D. Codified Laws § 22-6-1(3) (Supp. 1982)). Moreover, South Dakota law explicitly provides that parole is unavailable: "A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." S. D. Codified Laws § 24-15-4 (1979). The Governor[7] is authorized to pardon prisoners, or to commute their sentences, S. D. Const., Art. IV, § 3, but no other relief from sentence is available even to a rehabilitated prisoner.

Immediately after accepting Helm's guilty plea, the South Dakota Circuit Court sentenced Helm to life imprisonment under § 22-7-8. The court explained:

> "'I think you certainly earned this sentence and certainly proven that you're an habitual criminal and the record

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spective maximum penalties hereinafter set forth which are authorized upon conviction:

"(1) Class A felony: life imprisonment in the state penitentiary. A lesser sentence may not be given for a Class A felony;

"(2) Class 1 felony: life imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;

"(3) Class 2 felony: twenty-five years imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;

"(4) Class 3 felony: fifteen years imprisonment in the state penitentiary. In addition, a fine of fifteen thousand dollars may be imposed;

"(5) Class 4 felony: ten years imprisonment in the state penitentiary. In addition, a fine of ten thousand dollars may be imposed;

"(6) Class 5 felony: five years imprisonment in the state penitentiary. In addition, a fine of five thousand dollars may be imposed; and

"(7) Class 6 felony: two years imprisonment in the state penitentiary or a fine of two thousand dollars, or both.

"Nothing in this section shall limit increased sentences for habitual criminals . . . .

"Except in cases where punishment is prescribed by law, every offense declared to be a felony and not otherwise classified is a Class 6 felony." S. D. Comp. Laws Ann. § 22-6-1 (1967 ed., Supp. 1978) (amended 1979 and 1980).

[7] The Board of Pardons and Paroles is authorized to make recommendations to the Governor, S. D. Codified Laws §§ 24-14-1, 24-14-5 (1979);

would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest of your natural life, so you won't have further victims of your crimes, just be coming back before Courts. You'll have plenty of time to think this one over.'" *State* v. *Helm, supra*, at 500 (Henderson, J., dissenting) (quoting South Dakota Circuit Court, Seventh Judicial Circuit, Pennington County (Parker, J.)).

The South Dakota Supreme Court, in a 3–2 decision, affirmed the sentence despite Helm's argument that it violated the Eighth Amendment. *State* v. *Helm, supra.*

After Helm had served two years in the state penitentiary, he requested the Governor to commute his sentence to a fixed term of years. Such a commutation would have had the effect of making Helm eligible to be considered for parole when he had served three-fourths of his new sentence. See S. D. Codified Laws § 24–15–5(3) (1979). The Governor denied Helm's request in May 1981. App. 26.

In November 1981, Helm sought habeas relief in the United States District Court for the District of South Dakota. Helm argued, among other things, that his sentence constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. Although the District Court recognized that the sentence was harsh, it concluded that this Court's recent decision in *Rummel* v. *Estelle*, 445 U. S. 263 (1980), was dispositive. It therefore denied the writ.

The United States Court of Appeals for the Eighth Circuit reversed. 684 F. 2d 582 (1982). The Court of Appeals noted that *Rummel* v. *Estelle* was distinguishable. Helm's sentence of life without parole was qualitatively different from Rummel's life sentence with the prospect of parole because South Dakota has rejected rehabilitation as a goal of

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S. D. Executive Order 82–04 (Apr. 12, 1982), but the Governor is not bound by the recommendation, § 24–14–5.

the criminal justice system. The Court of Appeals examined the nature of Helm's offenses, the nature of his sentence, and the sentence he could have received in other States for the same offense. It concluded, on the basis of this examination, that Helm's sentence was "grossly disproportionate to the nature of the offense." 684 F. 2d, at 587. It therefore directed the District Court to issue the writ unless the State resentenced Helm. *Ibid.*

We granted certiorari to consider the Eighth Amendment question presented by this case. 459 U. S. 986 (1982). We now affirm.

II

The Eighth Amendment declares: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.

A

The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence. In 1215 three chapters of Magna Carta were devoted to the rule that "amercements"[8] may not be excessive.[9] And the principle was repeated and extended in the First Statute of Westminster, 3 Edw. I, ch. 6

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[8] An amercement was similar to a modern-day fine. It was the most common criminal sanction in 13th-century England. See 2 F. Pollock & F. Maitland, The History of English Law 513–515 (2d ed. 1909).

[9] Chapter 20 declared that "[a] freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it." See 1 S. D. Codified Laws, p. 4 (1978) (translation of Magna Carta). According to Maitland, "there was no clause in Magna Carta more grateful to the mass of the people . . . ." F. Maitland, Pleas of the Crown for the County of Gloucester xxxiv (1884). Chapter 21 granted the same rights to the nobility, and chapter 22 granted the same rights to the clergy.

(1275). These were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments. See, *e. g., Le Gras* v. *Bailiff of Bishop of Winchester*, Y. B. Mich. 10 Edw. II, pl. 4 (C. P. 1316), reprinted in 52 Selden Society 3 (1934). When prison sentences became the normal criminal sanctions, the common law recognized that these, too, must be proportional. See, *e. g., Hodges* v. *Humkin*, 2 Bulst. 139, 140, 80 Eng. Rep. 1015, 1016 (K. B. 1615) (Croke, J.) ("imprisonment ought always to be according to the quality of the offence").

The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment: "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." 1 Wm. & Mary, sess. 2, ch. 2 (1689). Although the precise scope of this provision is uncertain, it at least incorporated "the longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged." R. Perry, Sources of Our Liberties 236 (1959); see 4 W. Blackstone, Commentaries *16–*19 (1769) (hereafter Blackstone); see also *id.*, at *16–*17 (in condemning "punishments of unreasonable severity," uses "cruel" to mean severe or excessive). Indeed, barely three months after the Bill of Rights was adopted, the House of Lords declared that a "fine of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon was excessive and exorbitant, against magna charta, the common right of the subject, and the law of the land." *Earl of Devon's Case*, 11 State Tr. 133, 136 (1689).

When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights,[10] they also adopted the

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[10] The Eighth Amendment was based directly on Art. I, § 9, of the Virginia Declaration of Rights (1776), authored by George Mason. He, in turn, had adopted verbatim the language of the English Bill of Rights. There can be no doubt that the Declaration of Rights guaranteed at least

English principle of proportionality. Indeed, one of the consistent themes of the era was that Americans had all the rights of English subjects. See, *e. g.*, 1 J. Continental Cong. 83 (W. Ford ed. 1904) (Address to the People of Great Britain, Sept. 5, 1774) ("we claim all the benefits secured to the subject by the English constitution"); 1 American Archives 700 (4th series 1837) (Georgia Resolutions, Aug. 10, 1774) ("his Majesty's subjects in *America* . . . are entitled to the same rights, privileges, and immunities with their fellow-subjects in *Great Britain*"). Thus our Bill of Rights was designed in part to ensure that these rights were preserved. Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments.

B

The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.[11] In the

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the liberties and privileges of Englishmen. See A. Nevins, The American States During and After the Revolution 146 (1924) (Declaration of Rights "was a restatement of English principles—the principles of Magna Charta . . . and the Revolution of 1688"); A. Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America 205–207 (1968). As Mason himself had explained: "We claim Nothing but the Liberties & Privileges of Englishmen, in the same Degree, as if we had still continued among our Brethren in Great Britain . . . . We have received [these rights] from our Ancestors, and, with God's Leave, we will transmit them, unimpaired to our Posterity." Letter to "the Committee of Merchants in London" (June 6, 1766), reprinted in 1 The Papers of George Mason 71 (R. Rutland ed. 1970); cf. the Fairfax County Resolves (1774) (colonists entitled to all "Privileges, Immunities and Advantages" of the English Constitution), reprinted in 1 The Papers of George Mason 201.

[11] In *O'Neil* v. *Vermont*, 144 U. S. 323 (1892), the defendant had been convicted of 307 counts of "selling intoxicating liquor without authority," and sentenced to a term of over 54 years. The majority did not reach

leading case of *Weems* v. *United States*, 217 U. S. 349 (1910), the defendant had been convicted of falsifying a public document and sentenced to 15 years of "*cadena temporal*," a form of imprisonment that included hard labor in chains and permanent civil disabilities. The Court noted that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense," *id.*, at 367, and held that the sentence violated the Eighth Amendment. The Court endorsed the principle of proportionality as a constitutional standard, see, *e. g.*, *id.*, at 372–373, and determined that the sentence before it was "cruel in its excess of imprisonment," *id.*, at 377, as well as in its shackles and restrictions.

The Court next applied the principle to invalidate a criminal sentence in *Robinson* v. *California*, 370 U. S. 660 (1962).[12] A 90-day sentence was found to be excessive for the crime of being "addicted to the use of narcotics." The Court explained that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual." *Id.*, at 667. Thus there was no question of an inherently barbaric punishment. "But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Ibid.*

O'Neil's contention that this sentence was unconstitutional, for he did not include the point in his assignment of errors or in his brief. *Id.*, at 331. Furthermore, the majority noted that the Eighth Amendment "does not apply to the States." *Id.*, at 332. Accordingly the Court dismissed the writ of error for want of a federal question. *Id.*, at 336–337. The dissent, however, reached the Eighth Amendment question, observing that it "is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." *Id.*, at 339–340 (Field, J., dissenting).

[12] Members of the Court continued to recognize the principle of proportionality in the meantime. See, *e. g.*, *Trop* v. *Dulles*, 356 U. S. 86, 100 (1958) (plurality opinion); *id.*, at 111 (BRENNAN, J., concurring); *id.*, at 125–126 (Frankfurter, J., dissenting).

Most recently, the Court has applied the principle of proportionality to hold capital punishment excessive in certain circumstances. *Enmund* v. *Florida*, 458 U. S. 782 (1982) (death penalty excessive for felony murder when defendant did not take life, attempt to take life, or intend that a life be taken or that lethal force be used); *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion) ("sentence of death is grossly disproportionate and excessive punishment for the crime of rape"); *id.*, at 601 (POWELL, J., concurring in judgment in part and dissenting in part) ("ordinarily death is disproportionate punishment for the crime of raping an adult woman"). And the Court has continued to recognize that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription. See, *e. g.*, *Hutto* v. *Finney*, 437 U. S. 678, 685 (1978); *Ingraham* v. *Wright*, 430 U. S. 651, 667 (1977); *Gregg* v. *Georgia*, 428 U. S. 153, 171–172 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); cf. *Hutto* v. *Davis*, 454 U. S. 370, 374, and n. 3 (1982) *(per curiam)* (recognizing that some prison sentences may be constitutionally disproportionate); *Rummel* v. *Estelle*, 445 U. S., at 274, n. 11 (same).[13]

C

There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences.[14] The constitutional language itself suggests no exception for imprisonment. We have recognized that the Eighth Amendment imposes "parallel limitations" on bail, fines, and other punishments, *Ingraham* v. *Wright*, *supra*, at 664, and the text is explicit that bail and fines may not be excessive. It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms. See *Hodges* v. *Humkin*, 2 Bulst. 139, 80 Eng. Rep. 1015 (K. B. 1615). And our prior cases have recognized explicitly that prison sentences are subject to proportionality analysis. See, *e. g.*, *Weems*, *supra*, at 377; cf. *Hutto* v. *Finney*, *supra*, at 685 ("Confinement in a prison . . . is a form of punishment subject to scrutiny under Eighth Amendment standards").

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[13] The dissent charges that "the Court blithely discards any concept of *stare decisis*." *Post*, at 304; cf. *post*, at 305, 311–312, 317. On the contrary, our decision is entirely consistent with this Court's prior cases—including *Rummel* v. *Estelle*. See n. 32, *infra*. It is rather the dissent that would discard prior precedent. Its assertion that the Eighth Amendment establishes only a narrow principle of proportionality is contrary to the entire line of cases cited in the text.

[14] According to *Rummel* v. *Estelle*, "*one could argue* without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms

When we have applied the proportionality principle in capital cases, we have drawn no distinction with cases of imprisonment. See *Gregg* v. *Georgia*, *supra*, at 176 (opinion of Stewart, POWELL, and STEVENS, JJ.). It is true that the "penalty of death differs from all other forms of criminal punishment, not in degree but in kind." *Furman* v. *Georgia*, 408 U. S. 238, 306 (1972) (Stewart, J., concurring). As a result, "our decisions [in] capital cases are of limited assistance in deciding the constitutionality of the punishment" in a noncapital case. *Rummel* v. *Estelle*, 445 U. S., at 272. We agree, therefore, that, "[o]utside the context of capital punishment, *successful* challenges to the proportionality of par-

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of imprisonment in a state penitentiary, the length of sentence actually imposed is purely a matter of legislative prerogative." 445 U. S., at 274 (emphasis added). The Court did not adopt the standard proposed, but merely recognized that the argument was possible. To the extent that the State—or the dissent, see *post*, at 307—makes this argument here, we find it meritless.

ticular sentences [will be] exceedingly rare,"[15] *ibid.* (emphasis added); see *Hutto* v. *Davis, supra,* at 374. This does not mean, however, that proportionality analysis is entirely inapplicable in noncapital cases.

In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.[16] But no penalty is *per se* constitutional. As the Court noted in *Robinson* v. *California,* 370 U. S., at 667, a single day in prison may be unconstitutional in some circumstances.

III

A

When sentences are reviewed under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized.[17] First, we look to the gravity of the offense and the harshness of the penalty. In *Enmund*, for example, the Court examined the circumstances of the defendant's crime in great detail. 458 U. S., at 797–801. In *Coker* the Court considered the seriousness of the crime of rape, and compared it to other crimes, such as murder. 433 U. S., at 597–598 (plurality opinion); *id.*, at 603 (POWELL, J., concurring in judgment in part and dissenting in part). In *Robinson* the emphasis was placed on the nature of the "crime." 370 U. S., at 666–667. And in *Weems*, the Court's opinion commented in two separate places on the pettiness of the offense. 217 U. S., at 363 and 365. Of course, a court must consider the severity of the penalty in deciding whether it is disproportionate. See, *e. g.*, *Coker*, 433 U. S., at 598 (plurality opinion); *Weems*, 217 U. S., at 366–367.

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[15] In *Enmund* v. *Florida,* 458 U. S. 782 (1982), for example, the Court found the death penalty to be excessive for felony murder in the circumstances of that case. But clearly no sentence of imprisonment would be disproportionate for Enmund's crime.

[16] Contrary to the dissent's suggestions, *post,* at 305, 315, we do not adopt or imply approval of a general rule of appellate review of sentences. Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

[17] The dissent concedes—as it must—that some sentences of imprisonment are so disproportionate that they are unconstitutional under the Cruel and Unusual Punishments Clause. *Post,* at 311, n. 3; cf. *post,* at 310, n. 2. It offers no guidance, however, as to how courts are to judge these admittedly rare cases. We reiterate the objective factors that our cases

Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. Thus in *Enmund* the Court noted that all of the other felony murderers on death row in Florida were more culpable than the petitioner there. 458 U. S., at 795–796. The *Weems* Court identified an impressive list of more serious crimes that were subject to less serious penalties. 217 U. S., at 380–381.

Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdic-

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have recognized. See, *e. g.*, *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion). As the Court has indicated, no one factor will be dispositive in a given case. See *Hutto* v. *Davis*, 454 U. S. 370, 373–374, n. 2 (1982) *(per curiam)*; *Rummel* v. *Estelle*, 445 U. S., at 275–276. The inherent nature of our federal system and the need for individualized sentencing decisions result in a wide range of constitutional sentences. Thus no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment. See Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L. J. 1325, 1376–1377 (1979). But a combination of objective factors can make such analysis possible.

tions. In *Enmund* the Court conducted an extensive review of capital punishment statutes and determined that "only about a third of American jurisdictions would ever permit a defendant [such as Enmund] to be sentenced to die." 458 U. S., at 792. Even in those jurisdictions, however, the death penalty was almost never imposed under similar circumstances. *Id.*, at 794–796. The Court's review of foreign law also supported its conclusion. *Id.*, at 796–797, n. 22. The analysis in *Coker* was essentially the same. 433 U. S., at 593–597. And in *Weems* the Court relied on the fact that, under federal law, a similar crime was punishable by only two years' imprisonment and a fine. 217 U. S., at 380. Cf. *Trop* v. *Dulles*, 356 U. S. 86, 102–103 (1958) (plurality opinion).

In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

B

Application of these factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments—just as legislatures must make them in the first instance. Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender. Thus in *Enmund* the Court determined that the petitioner's conduct was not as serious as his accomplices' conduct. Indeed, there are widely shared views as to the relative seriousness of crimes. See Rossi, Waite, Bose, & Berk, The Seriousness of Crimes: Normative Structure and Individual Differences, 39 Am. Sociological Rev. 224, 237 (1974) (hereafter Rossi et al.). For example, as the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence. Cf. Tr. of Oral Arg. 16 (the State recognizes that the criminal law is more protective of people than property).

There are other accepted principles that courts may apply in measuring the harm caused or threatened to the victim or society. The absolute magnitude of the crime may be relevant. Stealing a million dollars is viewed as more serious than stealing a hundred dollars—a point recognized in statutes distinguishing petty theft from grand theft. See, *e. g.*, S. D. Codified Laws § 22–30A–17 (Supp. 1982). Few would dispute that a lesser included offense should not be punished more severely than the greater offense. Thus a court is justified in viewing assault with intent to murder as more serious than simple assault. See *Roberts* v. *Collins*, 544 F. 2d 168, 169–170 (CA4 1976) *(per curiam)*, cert. denied, 430 U. S. 973 (1977). Cf. *Dembowski* v. *State*, 251 Ind. 250, 252, 240 N. E. 2d 815, 817 (1968) (armed robbery more serious than robbery); *Cannon* v. *Gladden*, 203 Ore. 629, 632, 281 P. 2d 233, 235 (1955) (rape more serious than assault with intent to commit rape). It also is generally recognized that attempts are less serious than completed crimes. See, *e. g.*, S. D. Codified Laws § 22–4–1 (1979); 4 Blackstone *15. Similarly, an accessory after the fact should not be subject to a higher penalty than the principal. See, *e. g.*, 18 U. S. C. § 3.

Turning to the culpability of the offender, there are again clear distinctions that courts may recognize and apply. In *Enmund* the Court looked at the petitioner's lack of intent to kill in determining that he was less culpable than his accomplices. 458 U. S., at 798. Most would agree that negligent conduct is less serious than intentional conduct. South Dakota, for example, ranks criminal acts in ascending order of seriousness as follows: negligent acts, reckless acts, knowing acts, intentional acts, and malicious acts. S. D. Codified Laws § 22–1–2(1)(f) (Supp. 1982). A court, of course, is entitled to look at a defendant's motive in committing a crime. Thus a murder may be viewed as more serious when committed pursuant to a contract. See, *e. g.*, Mass. Gen. Laws Ann., ch. 279, § 69(a)(5) (West Supp. 1982–1983); cf. 4 Blackstone *15; *In re Foss*, 10 Cal. 3d 910, 519 P. 2d 1073 (1974).

This list is by no means exhaustive. It simply illustrates that there are generally accepted criteria for comparing the severity of different crimes on a broad scale, despite the difficulties courts face in attempting to draw distinctions between similar crimes.

C

Application of the factors that we identify also assumes that courts are able to compare different sentences. This assumption, too, is justified. The easiest comparison, of course, is between capital punishment and noncapital punishments, for the death penalty is different from other punishments in kind rather than degree.[18] For sentences of imprisonment, the problem is not so much one of ordering, but one of line-drawing. It is clear that a 25-year sentence generally is more severe than a 15-year sentence,[19] but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not. Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts.

The Sixth Amendment offers two good examples. A State is constitutionally required to provide an accused with a speedy trial, *Klopfer* v. *North Carolina*, 386 U. S. 213 (1967), but the delay that is permissible must be determined on a case-by-case basis. "[A]ny inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case . . . ." *Barker* v. *Wingo*, 407 U. S. 514, 522 (1972) (unanimous opinion). In *Barker*, we identified some of the objective factors that courts should consider in determining whether a particular delay was excessive. *Id.*, at 530. None of these factors is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id.*, at 533. Thus the type of inquiry that a court should conduct to determine if a given sentence is constitutionally disproportionate is similar to the type of inquiry required by the Speedy Trial Clause.

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[18] There is also a clear line between sentences of imprisonment and sentences involving no deprivation of liberty. See *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972).

[19] The possibility of parole may complicate the comparison, depending upon the time and conditions of its availability.

The right to a jury trial is another example. *Baldwin* v. *New York*, 399 U. S. 66 (1970), in particular, illustrates the line-drawing function of the judiciary, and offers guidance on the method by which some lines may be drawn. There the Court determined that a defendant has a right to a jury trial "where imprisonment for more than six months is authorized." *Id.*, at 69 (plurality opinion). In choosing the 6-month standard, the plurality relied almost exclusively on the fact that only New York City denied the right to a jury trial for an offense punishable by more than six months. As JUSTICE WHITE explained:

> "This near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn—on the basis of the possible penalty alone—between offenses that are and that are not regarded as 'serious' for purposes of trial by jury." *Id.*, at 72–73.

In short, *Baldwin* clearly demonstrates that a court properly may distinguish one sentence of imprisonment from another. It also supports our holding that courts properly may look to the practices in other jurisdictions in deciding where lines between sentences should be drawn.

IV

It remains to apply the analytical framework established by our prior decisions to the case before us. We first consider the relevant criteria, viewing Helm's sentence as life imprisonment without possibility of parole. We then consider the State's argument that the possibility of commutation is sufficient to save an otherwise unconstitutional sentence.

A

Helm's crime was "one of the most passive felonies a person could commit." *State* v. *Helm*, 287 N. W. 2d, at 501 (Henderson, J., dissenting). It involved neither violence nor threat of violence to any person. The $100 face value of Helm's "no account" check was not trivial, but neither was it a large amount. One hundred dollars was less than half the amount South Dakota required for a felonious theft.[20] It is easy to see why such a crime is viewed by society as among the less serious offenses. See Rossi et al., at 229.

Helm, of course, was not charged simply with uttering a "no account" check, but also with being a habitual offender.[21] And a State is justified in punishing a recidivist more severely than it punishes a first offender. Helm's status, however, cannot be considered in the abstract. His prior offenses, although classified as felonies, were all relatively minor.[22] All were nonviolent and none was a crime against a person. Indeed, there was no minimum amount in either the burglary or the false pretenses statutes, see nn. 1 and 2, *supra,* and the minimum amount covered by the grand larceny statute was fairly small, see n. 3, *supra.*[23]

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[20] If Helm had been convicted simply of taking $100 from a cash register, S. D. Codified Laws § 22–30A–1 (1979), or defrauding someone of $100, § 22–30A–3, or obtaining $100 through extortion, § 22–30A–4(1), or blackmail, § 22–30A–4(3), or using a false credit card to obtain $100, § 22–30A–8.1, or embezzling $100, § 22–30A–10, he would not be in prison today. All of these offenses would have been petty theft, a misdemeanor. § 22–30A–17 (amended 1982). Similarly, if Helm had written a $100 check against insufficient funds, rather than a nonexistent account, he would have been guilty of a misdemeanor. §§ 22–41–1. Curiously, under South Dakota law there is no distinction between writing a "no account" check for a large sum and writing a "no account" check for a small sum. § 22–41–1.2.

[21] We must focus on the principal felony—the felony that triggers the life sentence—since Helm already has paid the penalty for each of his prior offenses. But we recognize, of course, that Helm's prior convictions are relevant to the sentencing decision.

Helm's present sentence is life imprisonment without possibility of parole.[24] Barring executive clemency, see *infra,* at 300–303, Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in *Rummel* v. *Estelle.* Rummel was likely to have been eligible for parole within 12 years of his initial confinement,[25] a fact on which the Court relied heavily. See 445 U. S., at 280–281. Helm's sentence is the most severe punishment that the State could have imposed on any criminal for any crime. See n. 6, *supra.* Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.

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[22] Helm, who was 36 years old when he was sentenced, is not a professional criminal. The record indicates an addiction to alcohol, and a consequent difficulty in holding a job. His record involves no instance of violence of any kind. Incarcerating him for life without possibility of parole is unlikely to advance the goals of our criminal justice system in any substantial way. Neither Helm nor the State will have an incentive to pursue clearly needed treatment for his alcohol problem, or any other program of rehabilitation.

[23] As suggested at oral argument, the third-degree burglary statute covered entering a building with the intent to steal a loaf of bread. Tr. of Oral Arg. 14–16. It appears that the grand larceny statute would have covered the theft of a chicken.

[24] Every life sentence in South Dakota is without possibility of parole. See *supra,* at 282. We raise no question as to the general validity of sentences without possibility of parole. The only issue before us is whether, in the circumstances of this case and in light of the constitutional principle of proportionality, the sentence imposed on this respondent violates the Eighth Amendment.

[25] We note that Rummel was, in fact, released within eight months of the Court's decision in his case. See Los Angeles Times, Nov. 16, 1980, p. 1, col. 3.

We next consider the sentences that could be imposed on other criminals in the same jurisdiction. When Helm was sentenced, a South Dakota court was required to impose a life sentence for murder, S. D. Codified Laws § 22-16-12 (1979) (amended 1980), and was authorized to impose a life sentence for treason, § 22-8-1, first-degree manslaughter, § 22-16-15, first-degree arson, § 22-33-1, and kidnaping, S. D. Comp. Laws Ann. § 22-19-1 (1967 ed., Supp. 1978) (amended 1979). No other crime was punishable so severely on the first offense. Attempted murder, S. D. Codified Laws § 22-4-1(5) (1979), placing an explosive device on an aircraft, § 22-14A-5, and first-degree rape, § 22-22-1 (amended 1980 and 1982), were only Class 2 felonies. Aggravated riot was only a Class 3 felony. § 22-10-5. Distribution of heroin, §§ 22-42-2 (amended 1982), 34-20B-13(7) (1977), and aggravated assault, § 22-18-1.1 (amended 1980 and 1981), were only Class 4 felonies.

Helm's habitual offender status complicates our analysis, but relevant comparisons are still possible. Under § 22-7-7, the penalty for a second or third felony is increased by one class. Thus a life sentence was mandatory when a second or third conviction was for treason, first-degree manslaughter, first-degree arson, or kidnaping, and a life sentence would have been authorized when a second or third conviction was for such crimes as attempted murder, placing an explosive device on an aircraft, or first-degree rape. Finally, § 22-7-8, under which Helm was sentenced, authorized life imprisonment after three prior convictions, regardless of the crimes.

In sum, there were a handful of crimes that were necessarily punished by life imprisonment: murder, and, on a second or third offense, treason, first-degree manslaughter, first-degree arson, and kidnaping. There was a larger group for which life imprisonment was authorized in the discretion of the sentencing judge, including: treason, first-degree manslaughter, first-degree arson, and kidnaping; attempted murder, placing an explosive device on an aircraft, and first-degree rape on a second or third offense; and any felony after three prior offenses. Finally, there was a large group of very serious offenses for which life imprisonment was not authorized, including a third offense of heroin dealing or aggravated assault.

Criminals committing any of these offenses ordinarily would be thought more deserving of punishment than one uttering a "no account" check—even when the bad-check writer had already committed six minor felonies. Moreover, there is no indication in the record that any habitual offender other than Helm has ever been given the maximum sentence on the basis of comparable crimes. It is more likely that the possibility of life imprisonment under §22–7–8 generally is reserved for criminals such as fourth-time heroin dealers, while habitual bad-check writers receive more lenient treatment.[26] In any event, Helm has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes.

Finally, we compare the sentences imposed for commission of the same crime in other jurisdictions. The Court of Appeals found that "Helm could have received a life sentence without parole for his offense in only one other state, Nevada," 684 F. 2d, at 586, and we have no reason to doubt this finding. See Tr. of Oral Arg. 21. At the very least, therefore, it is clear that Helm could not have received such a severe sentence in 48 of the 50 States. But even under Nevada law, a life sentence without possibility of parole is merely authorized in these circumstances. See Nev. Rev. Stat. § 207.010(2) (1981). We are not advised that any defendant such as Helm, whose prior offenses were so minor, actually has received the maximum penalty in Nevada.[27] It appears that Helm was treated more severely than he would have been in any other State.

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[26] The State contends that §22–7–8 is more lenient than the Texas habitual offender statute in *Rummel*, for life imprisonment under §22–7–8 is discretionary rather than mandatory. Brief for Petitioner 22. Helm, however, has challenged only his own sentence. No one suggests that §22–7–8 may not be applied constitutionally to fourth-time heroin dealers or other violent criminals. Thus we do not question the legislature's judgment. Unlike in *Rummel*, a lesser sentence here could have been entirely consistent with both the statute and the Eighth Amendment. See Note, Disproportionality in Sentences of Imprisonment, 79 Colum. L. Rev. 1119, 1160 (1979).

B

The State argues that the present case is essentially the same as *Rummel* v. *Estelle*, for the possibility of parole in that case is matched by the possibility of executive clemency here. The State reasons that the Governor could commute Helm's sentence to a term of years. We conclude, however, that the South Dakota commutation system is fundamentally different from the parole system that was before us in *Rummel*.

As a matter of law, parole and commutation are different concepts, despite some surface similarities. Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases. The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. See, *e. g.*, *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1 (1979) (detailing Nebraska parole procedures); *Morrissey* v. *Brewer*, 408 U. S. 471, 477 (1972) ("the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system"). Thus it is possible to predict, at least to some extent, when parole might be granted. Commutation, on the other hand, is an ad hoc exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards. See, *e. g.*, *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458 (1981).

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[27] Under § 207.010(2), a Nevada court is authorized to impose a sentence of "imprisonment in the state prison for life with or without possibility of parole. If the penalty fixed by the court is life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of 10 years has been served." It appears that most sentences imposed under § 207.010(2) permit parole, even when the prior crimes are far more serious than Helm's. See, *e. g.*, *Rusling* v. *State*, 96 Nev. 778, 617 P. 2d 1302 (1980) (possession of a firearm by an ex-felon, two instances of driving an automobile without the owner's consent, four first-degree burglaries, two sales of marihuana, two sales of a restricted dangerous drug, one sale of heroin, one escape from state prison, and one second-degree burglary).

We explicitly have recognized the distinction between parole and commutation in our prior cases.[28] Writing on behalf of the *Morrissey* Court, for example, CHIEF JUSTICE BURGER contrasted the two possibilities: "Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals." 408 U. S., at 477. In *Dumschat*, THE CHIEF JUSTICE similarly explained that "there is a vast difference between a denial of parole . . . and a state's refusal to commute a lawful sentence." 452 U. S., at 466.

The Texas and South Dakota systems in particular are very different. In *Rummel*, the Court did not rely simply on the existence of some system of parole. Rather it looked to the provisions of the system presented, including the fact that Texas had "a relatively liberal policy of granting 'good time' credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years." 445 U. S., at 280. A Texas prisoner became eligible for parole when his calendar time served plus "good conduct" time equaled one-third of the maximum sentence imposed or 20 years, whichever is less. Tex. Code Crim. Proc. Ann., Art. 42.12, § 15(b) (Vernon 1979). An entering prisoner earned 20 days good-time per 30 days served, Brief for Respondent in *Rummel*, O. T. 1979, No. 78–6386, p. 16, and this could be increased to 30 days good-time per 30 days served, see Tex. Rev. Civ. Stat. Ann., Art. 6181–1, §§ 2, 3 (Vernon Supp. 1982–1983). Thus Rummel could have been eligible for parole in as few as 10 years, and could have expected to become eligible, in the normal course of events, in only 12 years.

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[28] In *Rummel* itself the Court implicitly recognized that the possibility of commutation is not equivalent to the possibility of parole. The Court carefully "distinguish[ed] Rummel from a person sentenced under a recidivist statute like [Miss. Code Ann. § 99–19–83 (Supp. 1979)], which provides for a sentence of life without parole." 445 U. S., at 281. But the Mississippi Constitution empowers the Governor to grant pardons in "all criminal and penal cases, excepting those of treason and impeachment." Art. 5, § 124. The Mississippi Supreme Court has long recognized that the power to pardon includes the power to commute a convict's sentence. See *Whittington* v. *Stevens*, 221 Miss. 598, 603–604, 73 So. 2d 137, 139–140 (1954).

In South Dakota commutation is more difficult to obtain than parole. For example, the Board of Pardons and Paroles is authorized to make commutation recommendations to the Governor, see n. 7, *supra*, but § 24–13–4 provides that "no recommendation for the commutation of . . . a life sentence, or for a pardon . . . , shall be made by less than the unanimous vote of all members of the board." In fact, no life sentence has been commuted in over eight years,[29] App. 29, while parole—where authorized—has been granted regularly during that period, Tr. of Oral Arg. 8–9. Furthermore, even if Helm's sentence were commuted, he merely would be eligible to be considered for parole.[30] Not only is there no guarantee that he would be paroled, but the South Dakota parole system is far more stringent than the one before us in *Rummel.* Helm would have to serve three-fourths of his revised sentence before he would be eligible for parole, § 24–15–5, and the provision for good-time credits is less generous, § 24–5–1.[31]

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[29] The most recent commutation of a life sentence in South Dakota occurred in 1975. App. 29. During the eight years since then, over 100 requests for commutation have been denied. See *id.*, at 22–26. Although 22 life sentences were commuted to terms of years between 1964 and 1975, see *id.*, at 29; but see n. 30, *infra*, we do not have complete figures on the number of requests that were denied during the same period. We are told only that at least 35 requests were denied. See App. 22–26. In any event, past practice in this respect—particularly the practice of a decade ago—is not a reliable indicator of future performance when the relevant decision is left to the unfettered discretion of each Governor. Indeed, the best indication we have of Helm's chance for commutation is the fact that his request already has been denied. *Id.*, at 26.

[30] The record indicates that the prisoner whose life sentence was commuted in 1975, see n. 29, *supra*, still has not been paroled. App. 29.

The possibility of commutation is nothing more than a hope for "an *ad hoc* exercise of clemency." It is little different from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless.

V

The Constitution requires us to examine Helm's sentence to determine if it is proportionate to his crime. Applying objective criteria, we find that Helm has received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State. We conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment.[32] The judgment of the Court of Appeals is accordingly

Affirmed.

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[31] Assume, for example, that in 1979 the Governor had commuted Helm's sentence to a term of 40 years (his approximate life expectancy). Even if Helm were a model prisoner, he would not have been eligible for parole until he had served over 21 years—more than twice the *Rummel* minimum. And this comparison is generous to South Dakota's position. If Rummel had been sentenced to 40 years rather than life, he could have been eligible for parole in less than 7 years.

[32] Contrary to the suggestion in the dissent, *post*, at 305–312, our conclusion today is not inconsistent with *Rummel* v. *Estelle*. The *Rummel* Court recognized—as does the dissent, see *post*, at 311, n. 3—that some sentences

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

The controlling law governing this case is crystal clear, but today the Court blithely discards any concept of *stare decisis*, trespasses gravely on the authority of the states, and distorts the concept of proportionality of punishment by tearing it from its moorings in capital cases. Only three Terms ago, we held in *Rummel* v. *Estelle*, 445 U. S. 263 (1980), that a life sentence imposed after only a *third* nonviolent felony conviction did not constitute cruel and unusual punishment under the Eighth Amendment. Today, the Court ignores its recent precedent and holds that a life sentence imposed after a *seventh* felony conviction constitutes cruel and unusual punishment under the Eighth Amendment. Moreover, I reject the fiction that all Helm's crimes were innocuous or nonviolent. Among his felonies were three burglaries and a third conviction for drunken driving. By comparison Rummel was a relatively "model citizen." Although today's holding cannot rationally be reconciled with *Rummel*, the Court does not purport to overrule *Rummel*. I therefore dissent.

I

A

The Court's starting premise is that the Eighth Amendment's Cruel and Unusual Punishments Clause "prohibits not

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of imprisonment are so disproportionate that they violate the Eighth Amendment. 445 U. S., at 274, n. 11. Indeed, *Hutto* v. *Davis*, 454 U. S., at 374, and n. 3, makes clear that *Rummel* should not be read to foreclose proportionality review of sentences of imprisonment. *Rummel* did reject a proportionality challenge to a particular sentence. But since the *Rummel* Court—like the dissent today—offered no standards for determining when an Eighth Amendment violation has occurred, it is controlling only in a similar factual situation. Here the facts are clearly distinguishable. Whereas Rummel was eligible for a reasonably early parole, Helm, at age 36, was sentenced to life with no possibility of parole. See *supra*, at 297, and 300–303.

only barbaric punishments, but also sentences that are disproportionate to the crime committed." *Ante*, at 284. What the Court means is that a sentence is unconstitutional if it is more severe than five Justices think appropriate. In short, all sentences of imprisonment are subject to appellate scrutiny to ensure that they are "proportional" to the crime committed.

The Court then sets forth three assertedly "objective" factors to guide the determination of whether a given sentence of imprisonment is constitutionally excessive: (1) the "gravity of the offense and the harshness of the penalty," *ante*, at 290–291; (2) a comparison of the sentence imposed with "sentences imposed on other criminals in *the same* jurisdiction," *ante*, at 291 (emphasis added); (3) and a comparison of "the sentences imposed for commission of the same crime in *other* jurisdictions." *Ante*, at 291–292 (emphasis added). In applying this analysis, the Court determines that respondent

> "has received the penultimate sentence for *relatively minor* criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction . . . ." *Ante*, at 303. (Emphasis added.)

Therefore, the Court concludes, respondent's sentence is "significantly disproportionate to his crime, and is . . . prohibited by the Eighth Amendment." This analysis is completely at odds with the reasoning of our recent holding in *Rummel*, in which, of course, JUSTICE POWELL dissented.

B

The facts in *Rummel* bear repeating. Rummel was convicted in 1964 of fraudulent use of a credit card; in 1969, he was convicted of passing a forged check; finally, in 1973 Rummel was charged with obtaining money by false pretenses, which is also a felony under Texas law. These three offenses were indeed nonviolent. Under Texas' recidivist statute, which provides for a mandatory life sentence upon conviction for a third felony, the trial judge imposed a life sentence as he was obliged to do after the jury returned a verdict of guilty of felony theft.

Rummel, in this Court, advanced precisely the same arguments that respondent advances here; we rejected those arguments notwithstanding that his case was stronger than respondent's. The test in *Rummel* which we rejected would have required us to determine on an abstract moral scale whether Rummel had received his "just deserts" for his crimes. We declined that invitation; today the Court accepts it. Will the Court now recall Rummel's case so five Justices will not be parties to "disproportionate" criminal justice?

It is true, as we acknowledged in *Rummel*, that the "Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime." 445 U. S., at 271. But even a cursory review of our cases shows that this type of proportionality review has been carried out only in a very limited category of cases, and never before in a case involving solely a sentence of imprisonment. In *Rummel*, we said that the proportionality concept of the capital punishment cases was inapposite because of the "unique nature of the death penalty . . . ." *Id.*, at 272. "Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel." *Ibid.*

The *Rummel* Court also rejected the claim that *Weems* v. *United States*, 217 U. S. 349 (1910), required it to determine whether Rummel's punishment was "disproportionate" to his crime. In *Weems*, the Court had struck down as cruel and unusual punishment a sentence of *cadena temporal* imposed by a Philippine Court. This bizarre penalty, which was unknown to Anglo-Saxon law, entailed a minumum of 12 years' imprisonment chained day and night at the wrists and ankles, hard and painful labor while so chained, and a number of "accessories" including lifetime civil disabilities. In *Rummel* the Court carefully noted that "*[Weems']* finding of disproportionality cannot be wrenched from the facts of that case." 445 U. S., at 273.[1]

The lesson the *Rummel* Court drew from *Weems* and from the capital punishment cases was that the Eighth Amendment did not authorize courts to review sentences of *imprisonment* to determine whether they were "proportional" to the crime. In language quoted incompletely by the Court, *ante*, at 288–289, n. 14, the *Rummel* Court stated:

> "Given the *unique nature* of the punishments considered in *Weems* and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the *length of the sentence actually imposed is purely a matter of legislative prerogative.*" 445 U. S., at 274. (Emphasis added.)

Five Justices joined this clear and precise limiting language.

In context it is clear that the *Rummel* Court was not merely summarizing an argument, as the Court suggests, *ante*, at 288–289, n. 14, but was stating affirmatively the rule of law laid down. This passage from *Rummel* is followed by an explanation of why it is permissible for courts to review sentences of death or bizarre physically cruel punishments as in *Weems*, but not sentences of imprisonment. 445 U. S., at 274–275. The *Rummel* Court emphasized, as has every opinion in capital cases in the past decade, that it was possible to draw a "bright line" between "the punishment of death and the various other permutations and commutations of punishment short of that ultimate sanction"; similarly, a line could be drawn between the punishment in *Weems* and "more traditional forms of imprisonment imposed under the Anglo-Saxon system." 445 U. S., at 275. However, the *Rummel* Court emphasized that drawing lines between different sentences of imprisonment would thrust the Court inevitably "into the basic line-drawing process that is pre-eminently the province of the legislature" and produce judgments that were no more than the visceral reactions of individual Justices. *Ibid.*

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[1] Other authorities have shared this interpretation of *Weems* v. *United States*. *E. g.*, Packer, Making the Punishment Fit the Crime, 77 Harv. L. Rev. 1071, 1075 (1964).

The *Rummel* Court categorically rejected the very analysis adopted by the Court today. Rummel had argued that various objective criteria existed by which the Court could determine whether his life sentence was proportional to his crimes. In rejecting Rummel's contentions, the Court explained why each was insufficient to allow it to determine in an *objective* manner whether a given sentence of imprisonment is proportionate to the crime for which it is imposed.

First, it rejected the distinctions Rummel tried to draw between violent and nonviolent offenses, noting that "the absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal." *Ibid.* Similarly, distinctions based on the amount of money stolen are purely "subjective" matters of line drawing. *Id.*, at 275–276.

Second, the Court squarely rejected Rummel's attempt to compare his sentence with the sentence he would have received in other States—an argument that the Court today accepts. The *Rummel* Court explained that such comparisons are flawed for several reasons. For one, the recidivist laws of the various states vary widely. "It is one thing for a court to compare those States that impose capital punishment for a specific offense with those States that do not. It is quite another thing for a court to attempt to evaluate the position of any particular recidivist scheme within Rummel's complex matrix." *Id.*, at 280 (citation and footnote omitted). Another reason why comparison between the recidivist statutes of different states is inherently complex is that some states have comprehensive provisions for parole and others do not. *Id.*, at 280–281. Perhaps most important, such comparisons trample on fundamental concepts of federalism. Different states surely may view particular crimes as more or less severe than other states. Stealing a horse in Texas may have different consequences and warrant different punishment than stealing a horse in Rhode Island or Washington, D. C. Thus, even if the punishment accorded Rummel in Texas were to exceed that which he would have received in any other state,

> "that severity hardly would render Rummel's punishment 'grossly disproportionate' to his offenses or to the punishment he would have received in the other States. . . . *Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.*" *Id.*, at 281–282. (Emphasis added.)

Finally, we flatly rejected Rummel's suggestion that we measure his sentence against the sentences imposed by Texas for other crimes:

> "Other crimes, of course, implicate other societal interests, making any such comparison inherently speculative. . . .
>
> ". . . Once the death penalty and other punishments different in kind from fine or imprisonment have been put to one side, there remains little in the way of objective standards for judging whether or not a life sentence imposed under a recidivist statute for several separate

> felony convictions not involving 'violence' violates the cruel-and-unusual-punishment prohibition of the Eighth Amendment." *Id.*, at 282–283, n. 27.

Rather, we held that the severity of punishment to be accorded different crimes was peculiarly a matter of legislative policy. *Ibid.*

In short, *Rummel* held that the length of a sentence of imprisonment is a matter of legislative discretion; this is so particularly for recidivist statutes. I simply cannot understand how the Court can square *Rummel* with its holding that "a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Ante*, at 290.[2]

If there were any doubts as to the meaning of *Rummel*, they were laid to rest last Term in *Hutto* v. *Davis*, 454 U. S. 370 (1982) *(per curiam)*. There a United States District Court held that a 40-year sentence for the possession of nine ounces of marihuana violated the Eighth Amendment. The District Court applied almost exactly the same analysis adopted today by the Court. Specifically, the District Court stated:

> "After examining the nature of the offense, the legislative purpose behind the punishment, the punishment in . . . Virginia [the sentencing jurisdiction] for other offenses, and the punishment actually imposed for the same or similar offenses in Virginia, this court must necessarily conclude that a sentence of forty years and twenty thousand dollars in fines is so grossly out of proportion to the severity of the crimes as to constitute cruel and unusual punishment in violation of the Eighth Amendment of the

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[2] Although *Rummel* v. *Estelle*, 445 U. S., at 274, n. 11, conceded that "a proportionality principle [might] come into play . . . if a legislature made overtime parking a felony punishable by life imprisonment," the majority has not suggested that respondent's crimes are comparable to overtime parking. Respondent's seven felonies are far more severe than Rummel's three.

> United States Constitution." *Davis* v. *Zahradnick*, 432 F. Supp. 444, 453 (WD Va. 1977).

The Court of Appeals sitting en banc affirmed. *Davis* v. *Davis*, 646 F. 2d 123 (CA4 1981) *(per curiam)*. We reversed in a brief *per curiam* opinion, holding that *Rummel* had disapproved each of the "objective" factors on which the District Court and en banc Court of Appeals purported to rely. 454 U. S., at 373. It was therefore clear error for the District Court to have been guided by these factors, which, paradoxically, the Court adopts today.

Contrary to the Court's interpretation of *Hutto*, see *ante*, at 289–290, and n. 17, and 303–304, n. 32, the *Hutto* Court did *not* hold that the District Court miscalculated in finding Davis' sentence disproportionate to his crime. It did *not* hold that the District Court improperly weighed the relevant factors. Rather, it held that the District Court clearly erred in even embarking on a determination whether the sentence was "disproportionate" to the crime. *Hutto* makes crystal clear that under *Rummel* it is error for appellate courts to second-guess legislatures as to whether a given sentence of imprisonment is excessive in relation to the crime,[3] as the Court does today, *ante*, at 295–303.

I agree with what the Court stated only days ago, that "the doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." *City of Akron* v. *Akron Center for Reproductive Health*,

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[3] Both *Rummel* and *Hutto* v. *Davis*, leave open the possibility that in extraordinary cases—such as a life sentence for overtime parking—it might be permissible for a court to decide whether the sentence is grossly disproportionate to the crime. I agree that the Cruel and Unusual Punishments Clause might apply to those rare cases where reasonable men cannot differ as to the inappropriateness of a punishment. In all other cases, we should defer to the legislature's line-drawing. However, the Court does not contend that this is such an extraordinary case that reasonable men could not differ about the appropriateness of this punishment.

Inc., 462 U. S. 416, 419–420 (1983). While the doctrine of *stare decisis* does not absolutely bind the Court to its prior opinions, a decent regard for the orderly development of the law and the administration of justice requires that directly controlling cases be either followed or candidly overruled.[4] Especially is this so with respect to two key holdings, neither more than three years old.

II

Although historians and scholars have disagreed about the Framers' original intentions, the more common view seems to be that the Framers viewed the Cruel and Unusual Punishments Clause as prohibiting the kind of torture meted out during the reign of the Stuarts.[5] Moreover, it is clear that until 1892, over 100 years after the ratification of the Bill of Rights, not a single Justice of this Court even asserted the doctrine adopted for the first time by the Court today. The prevailing view up to now has been that the Eighth Amendment reaches only the *mode* of punishment and not the length of a sentence of imprisonment.[6] In light of this history, it is disingenuous for the Court blandly to assert that "[t]he constitutional principle of proportionality has been recognized explicitly in this Court for almost a century." *Ante*, at 286. That statement seriously distorts history and our cases.

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[4] I do not read the Court's opinion as arguing that respondent's sentence of life imprisonment without possibility of parole is so different from Rummel's sentence of life imprisonment with the possibility of parole as to permit it to apply the proportionality review used in the death penalty cases, *e. g.*, *Coker* v. *Georgia*, 433 U. S. 584 (1977), to the former although not the latter. Nor would such an argument be tenable. As was noted in *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.):

"[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

The greater need for reliability in death penalty cases cannot support a distinction between a sentence of life imprisonment with possibility of parole and a sentence of life imprisonment without possibility of parole, especially when an executive commutation is permitted as in South Dakota.

[5] Compare, *e. g.*, Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839 (1969); Schwartz, Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel, 71 J. Crim. L. & Criminology 378, 379–382 (1980); Katkin, Habitual Offender Laws: A Reconsideration, 21 Buffalo L. Rev. 99, 115 (1971), with, *e. g.*, Wheeler, Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment, 24 Stan. L. Rev. 838,

This Court has applied a proportionality test only in extraordinary cases, *Weems* being one example and the line of capital cases another. See, *e. g.*, *Coker* v. *Georgia*, 433 U. S. 584 (1977); *Enmund* v. *Florida*, 458 U. S. 782 (1982). The Court's reading of the Eighth Amendment as restricting legislatures' authority to choose which crimes to punish by death rests on the finality of the death sentence. Such scrutiny is not required where a sentence of imprisonment is imposed after the State has identified a criminal offender whose record shows he will not conform to societal standards.

853–855 (1972); Comment, The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine, 24 Buffalo L. Rev. 783 (1975).

[6] In 1892, the dissent in *O'Neil* v. *Vermont*, 144 U. S. 323, 339–340 (1892) (Field, J., dissenting), argued that the Eighth Amendment "is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." Before and after *O'Neil*, most authorities thought that the Eighth Amendment reached only the mode of punishment and not the length of sentences. See, *e. g.*, Note, 24 Harv. L. Rev. 54, 55 (1910). Even after *Weems* v. *United States*, 217 U. S. 349, was decided in 1910, it was thought unlikely that the Court would extend proportionality analysis to cases involving solely sentences of imprisonment. See Packer, *supra* n. 1, at 1075. Until today, not a single case of this Court applied the "excessive punishment" doctrine of *Weems* to a punishment consisting solely of a sentence of imprisonment, despite numerous opportunities to do so. *E. g.*, *Hutto* v. *Davis*, 454 U. S. 370 (1982); *Rummel* v. *Estelle*, 445 U. S. 263 (1980); *Badders* v. *United States*, 240 U. S. 391 (1916); *Graham* v. *West Virginia*, 224 U. S. 616 (1912).

The Court's traditional abstention from reviewing sentences of imprisonment to ensure that punishment is "proportionate" to the crime is well founded in history, in prudential considerations, and in traditions of comity. Today's conclusion by five Justices that they are able to say that one offense has less "gravity" than another is nothing other than a bald substitution of individual subjective moral values for those of the legislature. Nor, as this case well illustrates, are we endowed with Solomonic wisdom that permits us to draw principled distinctions between sentences of different length for a chronic "repeater" who has demonstrated that he will not abide by the law.

The simple truth is that "[n]o neutral principle of adjudication permits a federal court to hold that in a given situation individual crimes are too trivial in relation to the punishment imposed." *Rummel* v. *Estelle*, 568 F. 2d 1193, 1201–1202 (CA5) (Thornberry, J., dissenting), vacated, 587 F. 2d 651 (1978) (en banc), aff'd, 445 U. S. 263 (1980). The apportionment of punishment entails, in Justice Frankfurter's words, "peculiarly questions of legislative policy." *Gore* v. *United States*, 357 U. S. 386, 393 (1958). Legislatures are far better equipped than we are to balance the competing penal and public interests and to draw the essentially arbitrary lines between appropriate sentences for different crimes.

By asserting the power to review sentences of imprisonment for excessiveness the Court launches into uncharted and unchartable waters. Today it holds that a sentence of life imprisonment, without the possibility of parole, is excessive punishment for a seventh allegedly "nonviolent" felony. How about the eighth "nonviolent" felony? The ninth? The twelfth? Suppose one offense was a simple assault? Or selling liquor to a minor? Or statutory rape? Or price fixing? The permutations are endless and the Court's opinion is bankrupt of realistic guiding principles. Instead, it casually lists several allegedly "objective" factors and arbitrarily asserts that they show respondent's sentence to be "significantly disproportionate" to his crimes. *Ante*, at 303. Must all these factors be present in order to hold a sentence excessive under the Eighth Amendment? How are they to be weighed against each other? Suppose several states punish severely a crime that the Court views as trivial or petty? I can see no limiting principle in the Court's holding.

There is a real risk that this holding will flood the appellate courts with cases in which equally arbitrary lines must be drawn. It is no answer to say that appellate courts must review criminal convictions in any event; up to now, that review has been on the validity of the judgment, not the sentence. The vast majority of criminal cases are disposed of by pleas of guilty,[7] and ordinarily there is no appellate review in such cases. To require appellate review of all sentences of imprisonment—as the Court's opinion necessarily does—will "administer the *coup de grace* to the courts of appeals as we know them." H. Friendly, Federal Jurisdiction: A General View 36 (1973). This is judicial usurpation with a vengeance; Congress has pondered for decades the concept of appellate review of sentences and has hesitated to act.

III

Even if I agreed that the Eighth Amendment prohibits imprisonment "disproportionate to the crime committed," *ante*, at 284, I reject the notion that respondent's sentence is disproportionate to his crimes for, if we are to have a system of laws, not men, *Rummel* is controlling.

The differences between this case and *Rummel* are insubstantial. First, Rummel committed three truly nonviolent felonies, while respondent, as noted at the outset, committed seven felonies, four of which cannot fairly be characterized as "nonviolent." At the very least, respondent's burglaries and his third-offense drunken driving posed real risk of serious harm to others. It is sheer fortuity that the places respondent burglarized were unoccupied and that he killed no pedestrians while behind the wheel. What would have happened if a guard had been on duty during the burglaries is a matter of speculation, but the possibilities shatter the notion that respondent's crimes were innocuous, inconsequential, minor, or "nonviolent." Four of respondent's crimes, I repeat, had harsh potentialities for violence. Respondent, far more than Rummel, has demonstrated his inability to bring his conduct into conformity with the minimum standards of civilized society. Clearly, this difference demolishes any semblance of logic in the Court's conclusion that respondent's sentence constitutes cruel and unusual punishment although Rummel's did not.

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[7] In 1972, nearly 90% of the convictions in federal courts followed pleas of guilty or *nolo contedere*. H. Friendly, Federal Jurisdiction: A General View 36 (1973).

The Court's opinion necessarily reduces to the proposition that a sentence of life imprisonment with the possibility of commutation, but without possibility of parole, is so much more severe than a life sentence with the possibility of parole that one is excessive while the other is not. This distinction does not withstand scrutiny; a well-behaved "lifer" in respondent's position is most unlikely to serve for life.

It is inaccurate to say, as the Court does, *ante*, at 301–302, that the *Rummel* holding relied on the fact that Texas had a relatively liberal parole policy. In context, it is clear that the *Rummel* Court's discussion of parole merely illustrated the difficulty of comparing sentences between different jurisdictions. 445 U. S., at 280–281. However, accepting the Court's characterization of *Rummel* as accurate, the Court today misses the point. Parole was relevant to an evaluation of Rummel's life sentence because in the "real world," he was unlikely to spend his entire life behind bars. Only a fraction of "lifers" are not released within a relatively few years. In Texas, the historical evidence showed that a prisoner serving a life sentence could become eligible for parole in as little as 12 years. In South Dakota, the historical evidence shows that since 1964, 22 life sentences have been commuted to terms of years, while requests for commutation of 25 life sentences were denied. And, of course, those requests for commutation may be renewed.

In short, there is a significant probability that respondent will experience what so many "lifers" experience. Even assuming that at the time of sentencing respondent was likely to spend more time in prison than Rummel,[8] that marginal difference is surely supported by respondent's greater demonstrated propensity for crime—and for more serious crime at that.

IV

It is indeed a curious business for this Court to so far intrude into the administration of criminal justice to say that a state legislature is barred by the Constitution from identifying its habitual criminals and removing them from the streets. Surely seven felony convictions warrant the conclusion that respondent is incorrigible. It is even more curious that the Court should brush aside controlling precedents that are barely in the bound volumes of the United States Reports. The Court would do well to heed Justice Black's comments about judges overruling the considered actions of legislatures under the guise of constitutional interpretation:

> "Such unbounded authority in any group of politically appointed or elected judges would unquestionably be sufficient to classify our Nation as a government of men, not the government of laws of which we boast. With a 'shock the conscience' test of constitutionality, citizens

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[8] No one will ever know if or when Rummel would have been released on parole since he was released in connection with a separate federal habeas corpus proceeding in 1980. On October 3, 1980, a Federal District Court granted Rummel's petition for a writ of habeas corpus on the grounds of ineffective assistance of counsel. *Rummel* v. *Estelle*, 498 F. Supp. 793 (WD Tex. 1980). Rummel then pleaded guilty to theft by false pretenses and was sentenced to time served under the terms of a plea-bargaining agreement. Two-Bit Lifer Finally Freed—After Pleading Guilty, Chicago Tribune, Nov. 15, 1980, p. 2, col. 3.

must guess what is the law, guess what a majority of nine judges will believe fair and reasonable. Such a test wilfully throws away the certainty and security that lies in a written constitution, one that does not alter with a judge's health, belief, or his politics." *Boddie* v. *Connecticut*, 401 U. S. 371, 393 (1971) (dissenting).

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK *v.* MID-LOUISIANA GAS CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81–1889. Argued March 22, 1983—Decided June 28, 1983*

Title I of the Natural Gas Policy Act of 1978 (NGPA) defines eight categories of natural gas production, specifies the maximum lawful price that may be charged for "first sales" in each category, and prescribes rules for increasing "first sale" prices each month and passing them on to downstream purchasers. Section 2(21) of the Act defines "first sale" as including, as a general rule, "any sale" of natural gas to any interstate or intrastate pipeline or to any local distribution company, but as not including such sales by the enumerated sellers or any affiliate thereof, unless the sale "is attributable to" volumes of natural gas produced by such sellers or any affiliate thereof. In 1979, the Federal Energy Regulatory Commission (FERC) issued Order No. 58, promulgating regulations implementing the statutory definition of "first sale." Independent producers and pipeline affiliates were assigned a "first sale" for all natural gas transferred to interstate pipelines. But pipelines themselves were not automatically assigned a "first sale" for their production. A pipeline enjoys a "first sale" for gas sold at a wellhead; for gas sold downstream that consists solely of its own production; for downstream sales of commingled independent-producer and pipeline-producer gas, as long as it dedicated an equivalent volume of its production to that purchaser by contract; and for downstream sales of commingled gas in an otherwise unregulated intrastate market. But if a pipeline sells commingled gas in an interstate market without dedicating a particular volume of its production to that particular sale, it does not enjoy "first sale" treatment. In 1980, the FERC issued Order No. 98, promulgating regulations under the Natural Gas Act (NGA) providing that the NGPA's "first sale" pricing should apply to all pipeline production on leases acquired after October 8, 1969, and from wells drilled after January 1, 1973, regardless of when the underlying lease had been acquired. All other pipeline production would be priced for ratemaking purposes just as it had before the

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*Together with No. 81–1958, *Arizona Electric Power Cooperative, Inc.* v. *Mid-Louisiana Gas Co. et al.*; No. 81–2042, *Michigan* v. *Mid-Louisiana Gas Co. et al.*; and No. 82–19, *Federal Energy Regulatory Commission* v. *Mid-Louisiana Gas Co. et al.*, also on certiorari to the same court.

NGPA was enacted. Respondents (interstate pipeline companies that transport natural gas from the wellhead to their customers) petitioned the Court of Appeals for review of both FERC orders, contending that Order No. 58 was based on a misreading of the NGPA and that in Order No. 98 the FERC had acted arbitrarily in refusing to authorize NGPA pricing for all pipeline production. The Court of Appeals held that the NGPA was intended to provide the same incentives to pipeline production as to independent production, that there were no practical obstacles to treating the transfer of gas from a pipeline's production division to its transportation division as a first sale, and that the FERC's reading of the NGPA was inconsistent with Congress' goal. The Court held Order No. 58 invalid and therefore did not review Order No. 98 separately.

Held: The FERC's exclusion of pipeline production from the NGPA's pricing scheme is inconsistent with the statutory mandate and would frustrate the regulatory policy that Congress sought to implement; the FERC, however, has discretion in deciding which transfer—intracorporate or downstream—should receive the "first sale" treatment. Pp. 325–343.

(a) As respondents contend, the FERC has the authority to treat as a first sale either the intracorporate transfer of natural gas from a pipeline-owned production system to the pipeline or the downstream transfer of commingled gas from the pipeline to a customer, in which case respondents would be able to include an NGPA rate for production among their costs of service, just as they do when they acquire natural gas from independent producers. The downstream transfer plainly satisfies § 2(21)'s "general rule" definition, and the legislative history clearly demonstrates that this statute was not intended to prohibit the FERC from deeming the intracorporate transfer a "sale." The statutory exception to the "general rule" definition does not diminish the FERC's authority to treat an intracorporate or downstream transfer as a first sale. Pp. 325–327.

(b) The purposes of the NGPA to preserve the FERC's authority under the NGA to regulate natural gas sales from pipelines to their customers and to supplant the FERC's authority to establish rates for the wholesale market, the market consisting of so-called "first sales" of natural gas, the legislative history, and the overall structure of the NGPA, all show that Congress intended pipeline production to receive "first sale" pricing and did not intend the FERC to be able to exclude pipeline production from the NGPA's coverage completely. Pp. 327–338.

(c) The FERC's argument that it would be wrong to assign intracorporate transfers a "first sale" price "automatically" because not even independent producers receive such treatment, refutes a position that no one advocates, since it is agreed that such a transfer should not "automatically" receive the NGPA ceiling price. There is no merit to the

FERC's argument that giving "first sale" treatment to downstream sales would result in the application of "first sale" maximum lawful prices to all mixed volume retail sales by interstate and intrastate pipelines and local distributors, thereby supplanting traditional state regulatory authority over the costs of intrastate pipeline transportation service. Nor is there any merit to the FERC's argument that pipeline producers would enjoy an unintended windfall if they receive "first sale" pricing. Pp. 339–342.

664 F. 2d 530, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 343.

Jerome M. Feit argued the cause for petitioners in all cases. With him on the briefs for petitioner in No. 82–19 were *Solicitor General Lee*, *Elliott Schulder*, and *Charles A. Moore*. *David E. Blabey*, *Richard A. Solomon*, and *David D'Alessandro* filed briefs for petitioner in No. 81–1889. *Arnold D. Berkeley* and *Richard I. Chaifetz* filed briefs for petitioner in No. 81–1958. *Frank J. Kelley*, Attorney General of Michigan, *Louis J. Caruso*, Solicitor General, and *Arthur E. D'Hondt* and *R. Philip Brown*, Assistant Attorneys General, filed a brief for petitioner in No. 81–2042.

James D. McKinney argued the cause for respondents in all cases. With him on the brief for respondents Mid-Louisiana Gas Co. et al. were *George W. McHenry, Jr.*, *John H. Burnes, Jr.*, *Alan C. Wolf*, *C. Frank Reifsnyder*, *Richard C. Green*, *Donald J. MacIver, Jr.*, *Richard Owen Baish*, *Scott D. Fobes*, *William M. Lange*, *Augustine A. Mazzei, Jr.*, *Morris Kennedy*, *William R. Mapes, Jr.*, and *Larry D. Hall*. *William W. Brackett*, *Daniel F. Collins*, *Terry O. Vogel*, and *Gary L. Cowan* filed a brief for respondent Michigan Wisconsin Pipe Line Co. *John E. Holtzinger, Jr.*, *Karol Lyn Newman*, *David E. Weatherwax*, and *Philip L. Jones* filed a brief for respondent Consolidated Gas Supply Corp.†

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†Briefs of *amici curiae* urging reversal were filed by *Byron S. Georgiou* for Edmund G. Brown, Jr., Governor of California; and by *Daniel E. Gib-*

JUSTICE STEVENS delivered the opinion of the Court.

By enacting the Natural Gas Policy Act of 1978 (NGPA), 92 Stat. 3350, 15 U. S. C. § 3301 *et seq.* (1976 ed., Supp. V), Congress comprehensively and dramatically changed the method of pricing natural gas produced in the United States. In Title I of that Act, Congress defined eight categories of natural gas production, specified the maximum lawful price that may be charged for "first sales" in each category, and prescribed rules for increasing first sale prices each month and passing them on to downstream purchasers. The question presented in these cases is whether the Federal Energy Regulatory Commission has the authority to exclude from this scheme most of the gas produced from wells owned by interstate pipelines and to prescribe a different method of setting prices for that gas. The answer is provided by the Act's definition of a "first sale" and by the scheme of the entire NGPA.

Respondents are interstate pipeline companies that transport natural gas from the wellhead to consumers. They purchase most of their gas from independent producers. In addition, they acquire a significant amount of gas from wells that they own themselves or that their affiliates own. Gas from all three sources is usually commingled in the pipelines before being delivered to their customers downstream. Thus, at the time of delivery it is often impossible to identify the producer of a particular volume of gas.

On November 14, 1979, the Commission[1] entered Order No. 58, promulgating final regulations to implement the defi-

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son, Robert B. McLennan, Janice E. Kerr, J. Calvin Simpson, Randolph W. Deutsch, Gordon Pearce, and *Thomas D. Clarke* for the Public Utilities Commission of the State of California et al.

Richard H. Silverman and *Morton L. Simons* filed a brief for the Public Power Group as *amicus curiae.*

[1] In this opinion, we use the term "Commission" to refer to both the Federal Energy Regulatory Commission and its predecessor, the Federal Power Commission.

nition of "first sale" under the NGPA.[2] The first category of producers—independent producers—is assigned a "first sale" for all natural gas transferred to interstate pipelines. The second category of producers—pipeline affiliates that are not themselves pipelines or distributors—is also assigned a "first sale" for all natural gas transferred to interstate pipelines, unless the Commission specifically rules to the contrary. In contrast, the third category of producers—pipelines themselves—is not automatically assigned a "first sale" for its production. A pipeline *does* enjoy a "first sale" for any gas it sells at the wellhead. Similarly, it enjoys a "first sale" for any gas it sells downstream that consists solely of its own production. It also enjoys a "first sale" for any downstream sales of commingled independent-producer and pipeline-producer gas, as long as it dedicated an equivalent volume of its own production to that purchaser by contract. Finally, it enjoys a "first sale" for any downstream sales of commingled gas in an otherwise unregulated intrastate market. However, if a pipeline producer sells commingled gas in an interstate market without having dedicated a particular volume of its production to that particular sale, it does not enjoy first sale treatment.

On August 4, 1980, the Commission entered Order No. 98.[3] The Commission noted that its construction of the NGPA in Order No. 58 had left most interstate pipeline production outside the Act's coverage, since so much of it is commingled with purchased gas. It announced that such production and its downstream sale remain subject to the Commission's regulatory jurisdiction under the Natural Gas Act (NGA), 52 Stat. 821, 15 U. S. C. § 717 *et seq.* (1976 ed. and Supp. V). In order to provide pipelines with an incentive to compete with independent producers in acquiring new leases and drilling new wells, the Commission decided that pipeline production should receive treatment under the NGA that is comparable to the treatment given independent production under the NGPA. It therefore promulgated regulations under the NGA providing that the NGPA's first sale pricing should apply to all pipeline production on leases acquired after October 8, 1969, and to all pipeline production from wells drilled after January 1, 1973, regardless of when the underlying lease had been acquired. All other pipeline production would be priced for ratemaking purposes just as it had been before the NGPA was enacted.[4]

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[2] See 44 Fed. Reg. 66577 (1979). The final regulations are found at 18 CFR § 270.203 (1983).

[3] See 45 Fed. Reg. 53091 (1980).

Respondents petitioned for review of both Commission orders, contending that Order No. 58 was based on a misreading of the NGPA and that in Order No. 98 the Commission had acted arbitrarily in refusing to authorize NGPA pricing for all pipeline production. The Court of Appeals held that the NGPA was intended to provide the same incentives to pipeline production as to independent production, that there were no practical obstacles to treating the transfer of gas from a pipeline's production division to its transportation division as a first sale, and that the Commission's reading of the NGPA was inconsistent with the goals of Congress. 664 F. 2d 530 (CA5 1981). It held Order No. 58 invalid and therefore did not review Order No. 98 separately.

We granted petitions for certiorari filed by the Commission and by state regulatory Commissions, which contend that the Court of Appeals' holding will provide the pipelines with windfall profits that Congress did not intend. 459 U. S. 820 (1982). In explaining why we are in general agreement with the Court of Appeals, we first review the statutory definition of "first sale," then consider the history and structure of the NGPA, and finally examine the specific arguments on behalf of the Commission's position.

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[4] The final regulations are found at 18 CFR §§ 2.66, 154.42 (1983).

I

The respondents seek first sale treatment for one of two transfers of natural gas: the *intracorporate* transfer from a pipeline-owned production system to the pipeline, or the *downstream* transfer of commingled gas from the pipeline to a customer. If either transfer is treated as a first sale, respondents would be able to include an NGPA rate for production among their costs of service, just as they do when they acquire natural gas from independent producers. They contend initially that Congress has authorized the Commission, in the exercise of its sound discretion, to treat either transfer as a first sale. They contend further that Congress has not authorized the Commission to reject both possibilities.

The definition of a "first sale" is found in § 2(21) of the NGPA. 92 Stat. 3355, 15 U. S. C. § 3301(21) (1976 ed., Supp. V). It takes the form of a general rule, qualified by an exclusion. The general rule sweeps broadly, providing:

> "(A) GENERAL RULE.—The term 'first sale' means any sale of any volume of natural gas—
>
> "(i) to any interstate pipeline or intrastate pipeline;
>
> "(ii) to any local distribution company;
>
> "(iii) to any person for use by such person;
>
> "(iv) which precedes any sale described in clauses (i), (ii), or (iii); *and*
>
> "(v) which precedes or follows any sale described in clauses (i), (ii), (iii), or (iv) and is defined by the Commission as a first sale in order to prevent circumvention of any maximum lawful price established under this Act." 92 Stat. 3355, 15 U. S. C. § 3301(21)(A) (1976 ed., Supp. V) (emphasis added).

Under the terms of the general rule, a transfer that falls within any one of its five clauses is presumptively a first sale.[5] This means that there can be many first sales of a single volume of gas between the well and the pipeline's customers.[6] In this case, the downstream transfer plainly satisfies the general rule. The only obstacle to including the intracorporate transfer within the general rule is the question whether it may properly be deemed a "sale."[7] That obstacle, however, is insubstantial. The legislative history clearly demonstrates that the statute was not intended to prohibit the Commission from deeming it a sale; the Conference Committee Report provides that the Commission may "establish rules applicable to intracorporate transactions under the first sale definition." H. R. Conf. Rep. No. 95–1752, p. 116 (1978). Thus, if the first sale definition consisted only of the general rule, the Commission would plainly be authorized to treat either transfer as a first sale.

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[5] The text of clause (v) makes it plain that the italicized word "and" at the end of clause (iv) was intended to be "or."

The exception to the general rule provides:

> "(B) CERTAIN SALES NOT INCLUDED.—Clauses (i), (ii), (iii), or (iv) of subparagraph (A) shall not include the sale of any volume of natural gas by any interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof, unless such sale is attributable to volumes of natural gas produced by such interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof." 92 Stat. 3355, 15 U. S. C. § 3301(21)(B) (1976 ed., Supp. V).

This language does not diminish the Commission's authority to treat the intracorporate transfer as a first sale. Whether it affects the Commission's authority to treat the downstream transfer as a first sale depends on the meaning of the words "attributable to." Although the Commission interpreted them as meaning "*solely* attributable to," it would be at least as consistent with the ordinary understanding of the words to interpret them as meaning "*measurably* attributable to."[8] Furthermore, it would have been fully consistent with the spirit of the exemption if the Commission had adopted the latter interpretation and had given "first sale" treatment to a percentage of the downstream sale—the percentage that pipeline production forms of all the gas in the pipeline.

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[6] One commentator has suggested that "where the producer sells to a gatherer, who in turn sells to a processor who eventually sells to a pipeline, there may be *three first sales* of the same gas." Hollis, Title I and Related Producer Matters Under the NGPA, in 2 Energy Law Serv., Monograph 4D, § 4D.02 (H. Green ed. 1981). See also 18 CFR § 270.202 (1983) (setting forth rules governing resales).

[7] As defined in the statute,

"[t]he term 'sale' means any sale, exchange, or other transfer for value." 92 Stat. 3355, 15 U. S. C. § 3301(20) (1976 ed., Supp. V).

Thus, we agree with the respondents that the Commission has the authority to treat either the intracorporate transfer or the downstream transfer as a first sale. That, however, does not dispose of this litigation. For there is a substantial difference between holding that the Commission had the authority to treat either transfer as a first sale and holding that the Commission was *required* so to treat one or the other.

II

In order to determine whether the Commission was obligated to treat either the intracorporate transfer or the relevant portion of the downstream transfer as a first sale, it is necessary to examine the purposes of the NGPA. Those purposes are rooted in the history of federal natural gas regulation before 1978 and in the overall structure of the statute.

A

Between 1938 and 1978, the Commission regulated sales of natural gas in interstate commerce pursuant to the NGA. The NGA was enacted in response to reports suggesting that the monopoly power of interstate pipelines was harming consumer welfare.[9] Initially, the Commission construed the

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[8] The latter meaning would be clear beyond debate if instead of the word "unless," Congress had used the phrase, "except to the extent that."

[9] See Federal Trade Comm'n, Utility Corporations, S. Doc. No. 92, 70th Cong., 1st Sess. (1928). The reports are mentioned explicitly in § 1(a) of the NGA.

NGA to require only regulation of gas sales at the downstream end of interstate pipelines. *E. g.*, *Natural Gas Pipeline Co.*, 2 F. P. C. 218 (1940). It authorized rates that were "just and reasonable" within the meaning of § 4(a) of the NGA, 52 Stat. 822, 15 U. S. C. § 717c(a), by examining whatever costs the pipeline had incurred in acquiring and transporting the gas to the consumer. If the pipeline itself or a pipeline affiliate had produced the gas, the actual expenses historically associated with production and gathering were included in the rate base to the extent proper and reasonable. See *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 614–615, and n. 25 (1944); *Colorado Interstate Gas Co.* v. *FPC*, 324 U. S. 581, 604–606 (1945). However, if the pipeline had purchased the gas from an independent producer, the Commission did not take jurisdiction over the producer to evaluate the reasonableness of its rates; it only considered the broad issue of whether, from the pipeline's perspective, the purchase price was "collusive or otherwise improperly excessive." *Phillips Petroleum Co.*, 10 F. P. C. 246, 280 (1951).

In 1954, this Court rejected the Commission's approach. We held that the NGA required the Commission to take jurisdiction over independent gas producers and to scrutinize the reasonableness of the rates they charged to interstate pipelines. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672 (1954). We interpreted the purpose of the NGA as being "to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company," *id.*, at 682, and concluded that, for regulatory purposes, there was no essential difference between the gas a pipeline obtains from independent producers and the gas it obtains from its own affiliates, *id.*, at 685.

The problems of regulating the natural gas industry grew steadily between *Phillips* and the passage of the NGPA. At first, the Commission attempted to follow the *Phillips* mandate by applying the same regulatory technique it had always applied to pipeline-produced natural gas. It calculated just and reasonable rates for each company—whether pipeline, pipeline affiliate, or independent producer—by studying the costs of production that had historically been incurred by that particular company. But that so-called "cost of service" approach quickly proved impractical. See *Atlantic Refining Co.* v. *Public Service Comm'n of New York*, 360 U. S. 378, 389 (1959). Whereas there were relatively few interstate pipelines, the vast number of natural gas producers threatened to overwhelm the Commission's administrative capacity. See *Permian Basin Area Rate Cases*, 390 U. S. 747, 757, and n. 13 (1968).

The Commission then shifted to an "area rate" approach. See *Statement of General Policy 61–1*, 24 F. P. C. 818 (1960). Instead of establishing individual rates for each company on the basis of its own costs of service, it established a single rate schedule for each producing region. Two elements of the area rate method bear mention. First, the Commission continued to base its computations on historical costs, rather than on projections of future costs. And second, it established two maximum rates for each area: a "new gas" rate for gas produced independently of oil from wells drilled after a given date, and an "old gas" rate for all other gas. The two-tiered structure, which priced gas on the basis of its "vintage," rested on the theory that for already-flowing gas "price could not serve as an incentive, and . . . any price above average historical costs, plus an appropriate return, would merely confer windfalls." *Permian Basin Area Rate Cases*, *supra*, at 797.

The Permian Basin area rate proceeding governed only production by independent producers. The Commission undertook a separate proceeding to consider whether it remained appropriate to treat pipelines and pipeline affiliates on a company-by-company basis. On October 7, 1969, 17 months after this Court approved the use of area rates, the

Commission concluded that for leases acquired from that date on, pipeline gas should receive pricing on a "parity" basis; such gas would be eligible for the same area rate as independently produced gas of the same vintage. *Pipeline Production Area Rate Proceeding (Phase I)*, 42 F. P. C. 738, 752 (Opinion No. 568). Gas produced from already-acquired leases would continue to be priced on the old single-company cost-of-service method "in order to expedite the proceedings and to avoid complications and evidentiary problems." *Id.*, at 753. Significantly, gas produced by pipeline affiliates would be treated in precisely the same manner as gas produced by the pipelines themselves.

In the early 1970's, it became apparent that the regulatory structure was not working. The Commission recognized that the historical-cost-based, two-tiered rate scheme had led to serious production shortages. See *Southern Louisiana Area Rate Proceeding*, 46 F. P. C. 86, 110–111 (1971). See generally Breyer & MacAvoy, The Natural Gas Shortage and the Regulation of Natural Gas Producers, 86 Harv. L. Rev. 941, 965–979 (1973). Therefore, the Commission modified its practices, shifting from an "area rate" to a "national rate" approach. *National Rates for Natural Gas*, 51 F. P. C. 2212 (1974) (Opinion No. 699). The national rate became effective for all wells drilled after January 1, 1973, and applied equally to production by independent producers, pipelines, and pipeline affiliates. A few months later, the Commission responded further by shifting from a pure historical-cost-based to an incentive-price-based approach, *National Rates for Natural Gas*, 52 F. P. C. 1604, 1615–1618 (1974) (Opinion No. 699-H), and by temporarily abandoning the practice of vintaging, *id.*, at 1636.[10]

These measures did not prove sufficient. The interstate rates remained substantially below the unregulated prices available for intrastate sales, and the interstate supply remained inadequate. Throughout 1977 and 1978, the 95th Congress studied the situation. During the closing hours of the Second Session, it enacted a package of five Acts, one of which was the NGPA. The NGPA is designed to preserve the Commission's authority under the NGA to regulate natural gas sales from pipelines to their customers; however, it is designed to supplant the Commission's authority to establish rates for the wholesale market, the market consisting of so-called "first sales" of natural gas.

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[10] In 1976, the Commission decided to return to vintaging. See *National Rates for Natural Gas*, 56 F. P. C. 509 (1976) (Opinion No. 770).

B

The NGPA was the product of a Conference Committee's careful reconciliation of two strong, but divergent, responses to the natural gas shortage.

The House bill had proposed "a single uniform price policy for natural gas produced in the United States." H. R. Rep. No. 95–496, pt. 4, p. 96 (1977). A key element of that policy had been the establishment of a statutory incentive price structure that would simultaneously promote production and reduce the regulatory burden:

> "[O]ther controversial aspects of current Federal regulation are not perpetuated. The uncertainties associated with lengthy judicial review of Federal Power Commission wellhead price determinations are avoided by use of a statutorily established maximum lawful price. Regulatory lag and other problems associated with reliance upon historical costs to establish just and reasonable wellhead prices are similarly avoided. Vintaging of new natural gas prices would also terminate." *Id.*, at 97.

The Senate bill, passed on the floor, would have maintained Natural Gas Act regulation for all gas sold or delivered in interstate commerce before January 1, 1977, and steadily cut back on Commission jurisdiction so that all natural gas sold after January 1, 1982, would have been completely deregulated. S. 2104, 95th Cong., 1st Sess., 123 Cong. Rec. 32306 (1977).

The Conference Committee's compromise has been justly described as "a comprehensive statute to govern future natural gas regulation." Note, Legislative History of the Natural Gas Policy Act, 59 Texas L. Rev. 101, 116 (1980). In Title I, it establishes an exhaustive categorization of natural gas production, and sets forth a methodology for calculating an appropriate ceiling price within each category: Section 102 covers "new natural gas and certain natural gas produced from the Outer Continental Shelf"; § 103 covers "new, onshore production wells"; § 104 covers "natural gas committed or dedicated to interstate commerce on the day before the date of the enactment of [the NGPA]"; § 105 covers "sales under existing intrastate contracts"; § 106 covers "sales under rollover contracts"; § 107 covers "high-cost natural gas"; § 108 covers "stripper well natural gas";[11] and § 109

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[11] Stripper well natural gas is defined as follows:

"(1) General Rule.—Except as provided in paragraph (2), the term 'stripper well natural gas' means natural gas determined . . . to be nonassociated natural gas produced during any month from a well if—

"(A) during the preceding 90-day production period, such well produced nonassociated natural gas at a rate which did not exceed an average of 60 Mcf per production day during such period; and

"(B) during such period such well produced at its maximum efficient rate of flow, determined in accordance with recognized conservation practices designed to maximize the ultimate recovery of natural gas.

"(2) Production in excess of 60 Mcf.—The Commission shall, by rule, provide that if nonassociated natural gas produced from a well which previously qualified as a stripper well under paragraph (1) exceeds an average of 60 Mcf per production day during any 90-day production period, such natural gas may continue to qualify as stripper well natural gas if the increase in nonassociated natural gas produced from such well was the result of the application of recognized enhanced recovery techniques.

"(3) Definitions.—For purposes of this subsection—

"(A) Production Day.—The term 'production day' means—

"(i) any day during which natural gas is produced; and

"(ii) any day during which natural gas is not produced if production during such day is prohibited by a requirement of State law or a conservation is a catchall, covering "any natural gas which is not covered by any maximum lawful price under any other section of this subtitle." 92 Stat. 3358–3368, 15 U. S. C. §§3312–3319 (1976 ed., Supp. V).

In each category of gas, the statute explicitly establishes an incentive pricing scheme that is wholly divorced from the traditional historical-cost methods applied by the Commission in implementing the NGA. The price is established either in terms of a dollar figure per million Btu's, or in terms of a previously existing price, and is inflated over time according to a statutory formula. See § 101. For three categories of gas, the statute recognizes that the ceiling may be too *low* and authorizes the Commission to raise it whenever traditional NGA principles would dictate a higher price. See §§ 104, 106, and 109. The Commission is also given a somewhat ambiguous mandate to authorize increases above the ceiling for the other five categories. See § 110(a)(2). In none of the eight categories, however, is the Commission given authority to require a rate lower than the statutory ceiling.

Several features of this comprehensive scheme bear directly on the question whether Congress intended the Commission to be able to exclude pipeline production from its coverage completely. To begin with, the categories are defined on the basis of the type of well and the past uses of its gas, not on the basis of who owns the well. And since it is drafted in a manner that is designed to be exhaustive, all natural gas production falls within at least one of the categories.

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practice recognized or approved by the State agency having regulatory jurisdiction over the production of natural gas.

"(B) 90-day Production Period.—The term '90-day production period' means any period of 90 consecutive calendar days excluding any day during which natural gas is not produced for reasons other than voluntary action of any person with the right to control production of natural gas from such well.

"(C) Nonassociated Natural Gas.—The term 'nonassociated natural gas' means natural gas which is not produced in association with crude oil." 92 Stat. 3367–3368, 15 U. S. C. § 3318(b) (1976 ed., Supp. V).

Moreover, the statute replaces the Commission's authority to fix rates of return to gas producers according to what is "just and reasonable" with a precise schedule of price ceilings. Section 601(b)(1)(A) provides that, "[s]ubject to paragraph (4), for purposes of sections 4 and 5 of the Natural Gas Act, any amount paid in any first sale of natural gas shall be deemed to be just and reasonable if . . . such amount does not exceed the applicable maximum lawful price established under Title I of this Act." 92 Stat. 3410, 15 U. S. C. § 3431(b)(1)(A) (1976 ed., Supp. V). The new statutory rates are intended to provide investors with adequate incentives to develop new sources of supply. As the Commission itself recognized in Order No. 98: "The Congressional decision to reorder the economic regulation of natural gas prices to provide a uniform system of statutorily prescribed price incentives was based on a . . . belief that such incentives are necessary to secure continued development and additional production of natural gas." 45 Fed. Reg. 53093 (1980).[12]

The statute evinces careful thought about the extent to which producers of "old gas"—gas already dedicated to interstate commerce before passage of the NGPA—would be able to enjoy incentive pricing. Section 104 of the statute directly incorporates part of the "vintaging" pattern that previously existed under the NGA.[13] Thus, most old gas contin-

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[12] The dissent suggests that because § 104 of the NGPA preserves the old NGA price for certain first sales of "old gas," the NGPA "did not intend to eliminate all vestiges of the Commission's earlier pricing authority." *Post*, at 348–349; see also *post*, at 348, n. 6. This suggestion confuses the choice of a benchmark *price* with the choice of regulatory *authority*. For some (but not all) old gas, the NGA price is preserved as an initial ceiling price. But over time, that price moves according to a statutory formula, rather than through the exercise of Commission regulatory authority. See §§ 101, 601(b)(1)(A).

[13] Section 104 provides:

"(a) APPLICATION.—In the case of natural gas committed or dedicated to interstate commerce on the day before the date of the enactment of this ues to receive the price it received under the NGA, increased over time in accordance with the inflation formula found in § 101. However, § 101(b)(5) of the Act specifies that if a volume of gas fits into more than one category, "the provision which could result in the highest price shall be applicable." 92 Stat. 3357, 15 U. S. C. § 3311(b)(5) (1976 ed., Supp. V). Thus, old gas that would be subject to the old NGA vintaging rules may be entitled to a higher rate if it falls within one or more of the other Title I categories, in particular § 107 (high-cost natural gas) and § 108 (stripper well gas). Whether or not the old NGA rates were in fact sufficient to stimulate some production from those categories, Congress concluded

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Act and for which a just and reasonable rate under the Natural Gas Act was in effect on such date for the first sale of such natural gas, the maximum lawful price computed under subsection (b) shall apply to any first sale of such natural gas delivered during any month.

"(b) MAXIMUM LAWFUL PRICE.—

"(1) GENERAL RULE.—The maximum lawful price under this section for any month shall be the higher of—

"(A)(i) the just and reasonable rate, per million Btu's, established by the Commission which was (or would have been) applicable to the first sale of such natural gas on April 20, 1977, in the case of April 1977; and

"(ii) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subparagraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month, or

"(B) any just and reasonable rate which was established by the Commission after April 27, 1977, and before the date of the enactment of this Act and which is applicable to such natural gas.

"(2) Ceiling Prices May Be Increased If Just and Reasonable.—The Commission may, by rule or order, prescribe a maximum lawful ceiling price, applicable to any first sale of any natural gas (or category thereof, as determined by the Commission) otherwise subject to the preceding provisions of this section, if such price is—

"(A) higher than the maximum lawful price which would otherwise be applicable under such provisions; and

"(B) just and reasonable within the meaning of the Natural Gas Act." 92 Stat. 3362–3363, 15 U. S. C. § 3314 (1976 ed., Supp. V).

that the Nation's energy needs justified the higher, statutory rates.[14]

In addition, the costs of providing these production incentives are plainly to be shouldered by downstream consumers, not by pipelines. Title II of the Act establishes a complicated structure, to be implemented by the Commission, for determining which consumers are to face the bulk of the price increases. 92 Stat. 3371–3381, 15 U. S. C. §§ 3341–3348 (1976 ed., Supp. V). That Title is designed to allocate the burden among categories of consumers; it is not designed to diminish in any way the incentive for producers or to force pipelines to bear any part of that burden. As the Conference Report makes plain:

> "The conference agreement guarantees that interstate pipelines may pass through costs of natural gas purchases if the price of the purchased natural gas does not exceed the ceiling price levels established under the legislation . . . . This recovery must be consistent with the incremental pricing provisions of Title II; however, Title II is structured to permit recovery of all costs which a pipeline is entitled to recover." H. R. Conf. Rep. No. 95–1752, p. 124 (1978).

Given such a comprehensive scheme, we conclude that Congress would have clearly identified, either in the statutory language or in the legislative history, any significant source of production that was intended to be excluded. For the usefulness of natural gas does not depend on who produces it, and there is no reason to believe that any one group of producers is less likely to respond to incentives than any other.[15] Yet nowhere in the NGPA do we find any expression of a desire to exclude pipeline production.

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[14] For some categories of gas, the NGPA ceiling prices are an intermediate step on the path from a fully regulated industry to a deregulated industry. Sections 121 and 122 of the NGPA provide a mechanism for the ultimate decontrol of a number of categories of natural gas.

Indeed, three statutory provisions combine to give a clear signal that the statute was intended to include such production. Section 203, which defines the acquisition costs subject to passthrough requirements, specifically states:

> "Interstate pipeline production.—For purposes of this section, in the case of any natural gas produced by any interstate pipeline or any affiliate of such pipeline, the first sale acquisition cost of such natural gas shall be determined in accordance with rules prescribed by the Commission." 92 Stat. 3375, 15 U. S. C. § 3343(b)(2) (1976 ed., Supp. V).

This provision expressly mentions pipeline production as a matter subject to NGPA jurisdiction. Perhaps even more significantly, it makes clear that Congress intended to continue a policy that had been in effect since 1938: a policy of drawing no distinction between wells owned by a pipeline itself and those owned by an affiliate. That point is equally apparent from the exemption half of the definition of "first sale" in Title I. That provision requires first sale treatment of a sale that is "attributable to volumes of natural gas produced by such interstate pipeline . . . *or* any affiliate thereof." § 2(21)(B) (emphasis added). See *supra*, at 326. Given that pipelines are to be treated in the same manner as pipeline affiliates, and given that pipeline affiliates are explicitly covered under the NGPA, see § 601(b)(1)(E), it follows directly that pipeline production is covered.[16]

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[15] In Order No. 98, the Commission effectively conceded that the goals of the NGPA apply just as directly to pipeline production as to independent production:

"Having embarked under the NGA upon a course which would provide price incentives for both pipeline and independent producer production to encourage production of additional gas supplies, and having been reaffirmed in this course by evidence of a similar purpose in Congress' enactment of a pricing scheme in the NGPA designed to encourage additional production, we believe that our mandate of coordinating the NGPA and the NPA would best be accomplished through a policy of pricing parity among independent and pipeline producers." 45 Fed. Reg. 53093 (1980).

In sum, the Court of Appeals correctly concluded that Congress intended pipeline production to receive first sale pricing. The Commission had no authority to ignore that intention absent a persuasive justification for doing so.[17]

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[16] In its reply brief, the Commission argues that Congress intended to distinguish between production by pipelines and production by pipeline affiliates, on the theory that affiliate sales "are governed by sales contracts" and are therefore "subject to the realities of the marketplace." Reply Brief for Federal Energy Regulatory Commission 4–6. Yet § 601(b)(1)(E) reveals that Congress expressly refused to rely on affiliate sales contracts as reflecting the realities of the marketplace. See *infra*, at 340. Congress brought affiliate production within the scope of the NGPA, fully aware that it could not rely on arm's-length bargaining between affiliates to keep prices low.

The dissent declares that "there is nothing in the legislative hearings, Reports, or debates which expresses any congressional dissatisfaction with the existing pricing of pipeline production or which suggests that the Commission's pricing of the oldest and lowest cost pipeline production on a cost-of-service basis . . . inhibited optimum production efforts by the pipelines." *Post*, at 347–348; see also *post*, at 350–351 ("the very fact that NGPA prices are not necessary to spur natural gas production by the pipeline companies—as they are for independent producers—is a sufficient basis upon which to uphold the Commission's interpretation"). The expression and suggestion are indeed present in both the statute, § 601(b)(1)(E), and the Conference Report, H. R. Conf. Rep. No. 95–1752, p. 124 (1978)—if cost-of-service pricing were adequate, Congress simply would not have included pipeline affiliate production within the scope of the NGPA.

[17] The dissent suggests that we violate the principle of deference to the agency's construction of the statute and improperly substitute our own reading of the statutory scheme. It is difficult, however, to argue convincingly that the Court is disregarding the agency's expertise when the Commission itself recognized in Order No. 98 that the policies of the NGPA would be better served by granting NGPA incentive prices to pipeline-produced gas. On this point, the Commission observed:

"Having embarked under the NGA upon a course which would provide price incentives for both pipeline and independent producer production to

III

Of course, "the interpretation of an agency charged with the administration of a statute is entitled to substantial deference." *Blum* v. *Bacon*, 457 U. S. 132, 141 (1982). It is therefore incumbent upon us to consider carefully the Commission's arguments that Congress implicitly intended to exempt pipeline production from an otherwise comprehensive regulatory scheme. We think it important to address three of the Commission's arguments explicitly: one is aimed at the propriety of giving first sale treatment to the intracorporate transfer, one at the propriety of giving first sale treatment to the downstream sale, and the third at the propriety of any form of first sale treatment for pipeline production.

The Commission suggests that it would be wrong to assign the intracorporate transfer a first sale price "automatically" because not even independent producers receive such automatic treatment. It emphasizes the Conference Committee's admonition that "maximum lawful prices are ceiling prices only. In no case may a seller receive a higher price than his contract permits." H. R. Conf. Rep. No. 95–1752, p. 74 (1978). Since arm's-length contractual bargaining may reduce the price for independent producers, the Commission suggests that "[i]t would be anomalous in the extreme to conclude that Congress nonetheless meant to permit pipeline producers to qualify automatically for full NGPA prices by virtue of intracorporate transfers that are not covered by contracts." Brief for Federal Energy Regulatory Commission 31–32.

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encourage production of additional gas supplies, *and having been reaffirmed in this course by evidence of a similar purpose in Congress' enactment of a pricing scheme in the NGPA designed to encourage additional production*, we believe that our mandate of coordinating the NGPA and the NGA would best be accomplished through a policy of pricing parity among independent producers and pipeline producers." 45 Fed. Reg. 53093 (1980) (emphasis added).

See also *supra*, at 334.

This argument refutes a position that no one advocates. We agree completely that the intracorporate transfer should not "automatically" receive the NGPA ceiling price. Congress undoubtedly intended pipeline producers to be treated in the same manner as pipeline affiliate producers. The latter group is subjected to market control, through the application of § 601(b)(1)(E), which provides that, "in the case of any first sale between any interstate pipeline and any affiliate of such pipeline, any amount paid in any first sale shall be deemed to be just and reasonable if, in addition to satisfying the requirements of [Title I], such amount does not exceed the amount paid in comparable first sales between persons not affiliated with such interstate pipeline." 92 Stat. 3410, 15 U. S. C. § 3431(b)(1)(E) (1976 ed., Supp. V).

The Commission also argues that adoption of the downstream sale theory would result in the application of first sale maximum lawful prices to all mixed volume retail sales by interstate pipelines, intrastate pipelines, and local distribution companies, thereby supplanting traditional state regulatory authority over the costs of intrastate pipeline transportation service.[18] We find this argument to be exaggerated. The Commission concedes that a downstream sale of pipeline production in another State is a "first sale" if that production has not been commingled with purchased gas. It allows the pipeline to include an appropriate NGPA rate (reflecting the costs of producing the gas) in the overall downstream price (which also reflects transportation and administrative costs). Applying the same principle to commingled gas[19] would in

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[18] See Brief for Federal Energy Regulatory Commission 39.

[19] We note that there do not appear to be any technical difficulties in taking this approach, for the Commission itself has established it as the approach it will follow in the absence of other regulatory procedures. In Order No. 58, the Commission invoked its "circumvention authority" under the NGPA to provide:

"[T]he term 'first sale' includes any sale by a pipeline or distributor which is comprised of production volumes from identifiable wells, properties, or no way trench upon state regulatory authority. The narrow issue posed—the proper cost to be assigned a pipeline's production efforts—is no different from the issue posed when a cost must be assigned to a pipeline's purchase of gas from its producing affiliate. And it effects no special change in the relationship between federal and state regulatory jurisdiction.[20]

Finally, the Commission argues that pipeline producers would enjoy an unintended windfall if they received first sale pricing. This windfall argument is obviously limited to only one particular category of gas: gas already dedicated to interstate commerce on the date of enactment of the NGPA, and subject to cost-of-service pricing. For under the Commission's own Order No. 98, all other pipeline production receives the same price it would receive if treated as a first sale under the NGPA. The Commission argues, however, that the residual cost-of-service production should be excluded because the pipelines were guaranteed a risk-free return on their initial investments in those wells. To allow the pipelines to receive NGPA pricing on future production from those wells would allegedly be "an irrational result with . . . unfair consequences for consumers."[21]

This argument glosses over the full meaning of Congress' determination that old gas qualifies for "first sale" treatment.

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reservoirs if a portion of those volumes is produced from wells, properties, or reservoirs owned by such pipeline or distributor unless:

"(1) The price at which such natural gas is sold is regulated pursuant to the Natural Gas Act or is regulated by a State agency empowered by State statute to establish, modify or set aside the rate for such sale; or

"(2) the Commission, on application, has determined not to treat such sale as a first sale." 44 Fed. Reg. 66580 (1979).

[20] As we recently noted in *Exxon Corp.* v. *Eagerton*, 462 U. S. 176, 186 (1983), § 105(a) of the NGPA extends federal authority to control producer prices to the intrastate market, but at the same time § 602(a) allows the States to establish price ceilings for that market that are lower than the federal ceiling.

[21] Brief for Federal Energy Regulatory Commission 35.

Under § 104, such gas retains its former NGA price, subject to increases over time for inflation. Section 104 provides absolutely no opportunity for a windfall. To be sure, old gas could receive a rate higher than the inflated NGA rate if it falls within one of the special categories of gas whose production Congress saw a need to stimulate. Seizing on that fact, the Commission suggests in a footnote to its brief that much of the gas at issue here would be "stripper well" production, subject to the incentive prices of § 108. It argues that, at least for that category of gas, a windfall would exist, since the Commission believes that cost-of-service treatment would provide just as strong an incentive as the § 108 price.[22]

That belief, however, was plainly not shared by Congress. For the statute explicitly grants the § 108 rate to pipeline affiliates—entities that were previously subject to the same cost-of-service treatment as the pipelines themselves. Moreover, the Commission does not pursue its windfall argument to its logical conclusion. For it agrees that a pipeline is entitled to the NGPA price for any production it sells at the wellhead. Yet by denying the pipeline NGPA treatment if it transports the gas to another State, the Commission only creates an incentive for wellhead sales, in flat contradiction to one of the NGPA's motivating purposes—to eliminate the dual market that distinguished between interstate and intrastate sales of natural gas.[23]

The Commission's position is contrary to the history, structure, and basic philosophy of the NGPA. Like the Court of Appeals, we conclude that its exclusion of pipeline production is "inconsistent with the statutory mandate [and would] frustrate the policy that Congress sought to implement." *FEC*

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[22] *Id.*, at 34, n. 35.

[23] Similarly, the Commission admits that a pipeline is entitled to the NGPA price for its own production, as long as the downstream contract shows that the gas was "dedicated" to it from the beginning. We perceive no reason why the absence of a "dedication" clause in the contract should turn a legitimate incentive into a "windfall."

v. *Democratic Senatorial Campaign Committee*, 454 U. S. 27, 32 (1981). Unlike the Court of Appeals, however, we believe Congress intended to give the Commission discretion in deciding whether first sale treatment should be provided at the intracorporate transfer or at the downstream transfer.[24] The cases should be remanded to the Commission so that it may may make that choice. The judgment of the Court of Appeals is vacated, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

Our task in these cases is not to interpret the Natural Gas Policy Act (NGPA) as we think best but rather the narrower inquiry into whether the Commission's construction was sufficiently reasonable to be accepted by a reviewing court. *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U. S. 27, 39 (1981); *Train* v. *Natural Resources Defense*

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[24] The dissent appears to misunderstand our holding today, since it suggests that we do not hold unreasonable either of the Commission's actions (with regard to the downstream transfer and with regard to the intracorporate transfer). To summarize, we have reached three conclusions in this litigation. (1) It would be reasonable for the Commission not to give first sale treatment to the intracorporate transfer, *as long as such treatment is given to the downstream transfer.* (2) Similarly, it would be reasonable for the Commission not to give first sale treatment to the downstream transfer, *as long as such treatment is given to the intracorporate transfer.* (3) Yet it was an unreasonble construction of this comprehensive and exhaustive new legislation, contrary to its structure, purposes, and history, for the Commission to chop out virtually all pipeline production and to relegate it to discretionary regulation under the NGA. Both the dissent, *post*, at 350–351, and the Court of Appeals, 664 F. 2d 530, 536–538 (CA5 1981), offer reasons for preferring approach (1) to approach (2). Those policy arguments are not totally without merit, but they are not so persuasive that we would reverse the Commission if it adopted approach (2), see *supra*, at 340–341, and they of course provide no justification for rejecting approach (1).

Council, Inc., 421 U. S. 60, 75 (1975); *Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 450 (1978). "To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *FEC* v. *Democratic Senatorial Campaign Committee, supra*, at 39; *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965). The Court today rejects the agency's interpretation and substitutes its own reading of this highly complex law. In doing so, the Court imposes a construction not set forth in the statute itself, not addressed in the legislative history, not selected by the agency, and different even from that of the Court of Appeals. Notwithstanding its novelty, perhaps the Court's construction that pipeline production must be given "first sale" treatment either as an intracorporate transfer or at the point of a downstream sale is a reasonable interpretation of the Act. But its reasonability does not establish the unreasonability of the Commission's interpretation, and that, of course, is the question before us.

I

The relevant statutory provisions of the NGPA clearly will bear the Commission's construction. Order No. 58 of the Commission, the interpretive regulation at issue, delineates the circumstances under which a sale of production by an interstate or intrastate pipeline, local distribution company, or affiliate of one of these entities, will be regulated as a first sale under the NGPA. Section 2(21)(B) of the NGPA provides that a sale of natural gas by a pipeline or affiliate thereof is not a first sale unless the sale is "attributable" to volumes of natural gas produced by such pipeline, distributor, or affiliate thereof.[1] The Court's interpretation of the provision was considered but rejected by the Commission.

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[1] "(B) Certain sales not included.—Clauses (i), (ii), (iii), or (iv) of subparagraph (A) shall not include the sale of any volume of natural gas by any interstate pipeline, intrastate pipeline, or local distribution company, or

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> "Although many comments have recommended otherwise, the Commission will not interpret the term 'attributable' so as to confer first sale treatment on pipeline sales if only a portion of the gas involved was produced by the pipeline. The language of section 2(21)(B) requires that a sale be 'attributable' to the pipeline's *own* production. We believe that Congress did not intend for pipeline or distributor sales from general system supply to qualify as 'first sales' merely because some portion of that supply, no matter how small, consists of its own production. Rather, we believe that these sales were precisely the type of sales which were intended to qualify for general exclusion from first sale regulation for pipeline or distributor sales in section 2(21)(B) of the NGPA. The attribution rule accomplishes that result." Order No. 58, 44 Fed. Reg. 66578 (1979).

Unlike the majority of this Court, the Court of Appeals did not reject this interpretation, which limits the downstream sales of pipeline produced gas eligible for first sale prices, see *ante*, at 323. Even the Court stops short of suggesting that the Commission's interpretation is not a plausible construction of the statutory language.[2]

The Court notes only that it would be "at least as consistent with the ordinary understanding of the words to interpret them as meaning '*measurably* attributable to,'" thus including downstream sales of commingled gas. *Ante*, at 327. I doubt that the Court's meaning is equally plausible, given

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any affiliate thereof, unless such sale is attributable to volumes of natural gas produced by such interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof." 92 Stat. 3355, 15 U. S. C. § 3301(21)(B) (1976 ed., Supp. V).

[2] The Commission's interpretation that downstream pipeline sales need not be considered first sales within the meaning of the Act is supported by the House Report on the proposed legislation which states that "the first sale price is essentially a wellhead price." H. R. Rep. No. 95–496, pt. 4, p. 103 (1977). In addition, Title I of the NGPA itself is entitled "wellhead pricing."

other usages of similar language throughout the NGPA,[3] but accepting the Court's alternative definition as a reasonable possibility, one still does not reach the conclusion that the Commission's own interpretation is *un*reasonable.

The Commission also refused to accord first sale treatment to pipeline production by imputing a sale at the point where the pipeline takes its gas into its transmission system.

> "[I]mputing a sale at the wellhead would extend the first sale concept to intracorporate transactions. As a result, Title I prices would be applied to bookkeeping and accounting entries of a corporation rather than to actual sales." 44 Fed. Reg. 66579 (1979).[4]

The Court of Appeals and now this Court reject this interpretation by the Commission, again notwithstanding that it is a perfectly reasonable interpretation of the statutory language. The issue turns on whether intracorporate transfers must be deemed "sales." The NGPA defines a "sale" as a "sale, exchange or other transfer for value." § 2(20), 15 U. S. C. § 3301(2)(20) (1976 ed., Supp. V). The ordinary meaning of the term supports the Commission's view that a

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[3] When Congress meant to limit the applicability of certain sections, it used "attributable" in conjunction with qualifying language. See, *e. g.*, § 110(a)(1), 15 U. S. C. § 3320(a)(1) (1976 ed., Supp. V), which provides that a first sale price may exceed the maximum lawful price if the excess is necessary to recover "State severance taxes attributable to the production of such natural gas and borne by the seller, but only to the extent the amount of such taxes does not exceed the limitation of subsection (b)"; see also § 503(e)(2)(B), 15 U. S. C. § 3413(e)(2)(B) (1976 ed., Supp. V). Congress' failure to similarly modify "attributable" in § 2(21)(B) suggests that "attributable" means, as the Commission held, "exclusively comprised of."

[4] "In addition, such a rule would extend NGPA first sale jurisdiction to all corporations which produce their own natural gas. Comments filed by industrial corporations which consume their own natural gas production indicate that this would produce undesirable results and that no valid regulatory purpose would be served by extending the Commission's jurisdiction to cover such production." 44 Fed. Reg. 66579 (1979).

"sale" should be an actual exchange of value and title rather than a paper transaction. The Conference Report's indication that the Commission may establish rules applicable to intracorporate transactions under the first sale definition, H. R. Conf. Rep. No. 95-1752, p. 116 (1978), allows but does not compel the agency to treat intracorporate transfers as first sales. Indeed, if the statute required the Commission to give first sale treatment to such transfers, the Conference Report's point would be superfluous. Moreover, the Conference Report discusses the question in the context of the Commission's authority to include intracorporate transfers as first sales in order to prevent circumvention of maximum price requirements. To use that language to require transfers to be given first sale prices is to turn the Conference Report on its head. In sum, neither the statute nor the legislative history compels the agency to define intracorporate transfers as first sales—a definition that would depart from 40 years of administration of the Natural Gas Act (NGA) during which time an intracorporate transfer had never been considered a sale of natural gas.

The Court concedes that "there is a substantial difference between holding that the Commission had the authority to treat either transfer as a first sale and holding that the Commission was *required* so to treat one or the other." *Ante*, at 327. Since there is no legislative history which supports its position, the Court turns to the structure and purposes of the NGPA. Concededly, the purpose of the NGPA was to replace traditional historical-cost methods with an incentive pricing scheme that would create sufficient financial incentive to spur the exploration and development of natural gas. See H. R. Rep. No. 95-496 (1978); Note, Legislative History of the Natural Gas Policy Act, 59 Texas L. Rev. 101 (1980). If the Commission's interpretation undermined the Act's ability to fulfill that goal, the Court would have a stronger case. But there is nothing in the legislative hearings, Reports, or debates which expresses any congressional dissatisfaction with the existing pricing of pipeline production or which suggests that the Commission's pricing of the oldest and lowest cost pipeline production on a cost-of-service basis, under which the pipelines recover all of their prudent investments regardless of the success of their efforts, inhibited optimum production efforts by the pipelines. One can easily agree with the Court that "there is no reason to believe that any one group of producers is less likely to respond to incentives than any other," *ante*, at 336–337, while finding that the cost-of-service basis provides sufficient incentives for pipeline companies to increase production. Thus, Order No. 58 is in no sense inconsistent with the primary purpose of the NGPA.[5]

Unable to demonstrate that the Commission's interpretation is counter to the primary purpose of the NGPA,[6] the Court attempts to portray the Commission's regulation as inconsistent with "several features" of the regulatory scheme. The effort is unsuccessful. First, the Act's treatment of old gas in § 104 of the NGPA supports rather than undermines the Commission's position. By incorporating part of the vintaging pattern that previously existed under the NGA, § 104 indicates that the NGPA did not intend to eliminate all vestiges of the Commission's earlier pricing authority or to ensure that all gas, including old gas, would be entitled to higher "first sale" prices. Only that old gas which qualified for first sale treatment would receive the higher price. § 101(b)(5).

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[5] This is even more true after Order No. 98, which grants new pipeline production parity pricing with first sale prices for independent producers. Only old gas is now limited to the NGA prices. The added revenues derived by pipelines from production of gas from pre-1973 wells cannot possibly operate as an incentive for the drilling of new wells.

[6] The Court does suggest that the Commission's view serves to perpetuate the dual system of natural gas regulation. While the House bill had a more ambitious objective of completely replacing the existing regulatory structure, the Senate disagreed, and the compromise enacted into law did not totally supplant the NGA. Section 104 of the Act directly incorporates the NGA "vintaging" pattern. As the Court recognizes, most old gas continues to receive the price it received under the NGA, increased over time in accordance with the inflation formula found in § 101. *Ante*, at 334–335. The Act provides incentive pricing for new gas to insure adequate supplies in the interstate market, but maintains NGA price controls on old gas to prevent unnecessary price increases.

Second, the Court makes much of the fact that categories of gas entitled to first sale treatment are defined on the basis of the type of well and not on who owns the well. This is true of the general "first sale" rule but not of the exception to that rule provided in § 2(21)(B) which governs these cases and which unmistakably is directed at the treatment to be given pipeline production vis-à-vis natural gas obtained from independent producers. Moreover, since the Act does not direct or contemplate that all natural gas will receive higher prices, the Court's discussion of Title II of the Act, which deals with who is to shoulder the higher prices, hardly bears on what gas is entitled to first sale treatment under Title I. The fact that consumers would shoulder the "bulk of the price increases," *ante*, at 336, is no argument for enlarging the amount of gas for which price increases would be provided.

Finally, the limitation on affiliate pricing in § 601(b)(1)(E), does not, either singly or in combination with other sections, *ante*, at 337–338, require that all pipeline production be entitled to "first sale" treatment.[7] As the Court observes later in its opinion, the purpose of § 601(b)(1)(E) is to insure that if first sale prices are afforded to pipeline affiliates, such affiliate pricing would be subject to market control. *Ante*, at 340. This section, which assures that the lack of arm's-length bargaining where first sales are to affiliates does not result in excessive prices, hardly reflects a congressional intent that all pipeline production be entitled to first sale prices. Thus, § 203 of the Act, which defines the acquisition costs subject to passthrough requirements, offers no support for the Court's position. The section defines how first sale costs shall be determined but does not determine the volumes of gas eligible to receive first sale prices; in addition, the provision, by its terms, covers only wells owned by pipeline affiliates.

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[7] The Commission plausibly distinguishes affiliate sales, governed by sales contracts, from the purely internal transfers of gas between production and transportation divisions of a single corporation. See Order No. 102, 45 Fed. Reg. 67084 (1980). In a footnote, the Court denigrates the Commission's analysis by observing that § 601(b)(1)(E) "reveals that Congress expressly refused to rely on affiliate sales contracts as reflecting the realities of the marketplace." *Ante*, at 338, n. 16. But it is precisely because § 601(b)(1)(E) safeguards the consumer from unduly priced sales involving affiliates but not intracorporate transfers that it is reasonable that the former but not the latter may receive first sale treatment.

II

Since neither the plain language of the Act nor its legislative history forbids the agency's intepretation, and the purpose of the Act is not undermined by the Commission's approach, considerable deference should be afforded the agency's interpretation. *Blum* v. *Bacon*, 457 U. S. 132, 141–142 (1982).[8] Indeed, the very fact that NGPA prices are not necessary to spur natural gas production by the pipeline companies—as they are for independent producers—is a sufficient basis upon which to uphold the Commission's interpretation. The Commission, however, has gone further and offered additional reasons for the order.

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[8] The Court suggests that it is not disregarding the agency's expertise because the Commission subsequently granted NGPA incentive prices to new pipeline produced gas in Order No. 98. *Ante*, at 338–339, n. 17. The Commission concluded, however, that the policies of the NGPA would be better served by granting NGPA prices *only* to pipelines previously subject to area or nationwide rate treatment while retaining NGA pricing for gas produced under cost-of-service pricing.

"[T]he Commission found that such incentive prices should not be available for production from leases previously subject to cost-of-service treatment, reasoning that such pipelines have already enjoyed the benefits of a certain recovery of and return on the costs of production, and that their customers, who have borne the risks of this investment in the early years of exploration and development, should have an opportunity to receive the price benefits of cost-of-service treatment for gas produced as a result of the expenditures." Order No. 102, 45 Fed. Reg. 67084 (1980).

The Commission's justification for rejecting the Court's intracorporate transfer and downstream "first sales" approaches are not implausible. Adoption of the "downstream sale" approach would override the existing division between state and federal regulation of pipeline sales of natural gas. As the Commission pointed out, adoption of this theory

> "would result in the uniform application of first sale maximum lawful prices to all mixed volume retail sales made by pipelines and distributors. . . . The Commission finds no evidence in [§] 2(21)(B) or in any other provision of the statute that suggests that Congress intended to require the Commission to expand the field of federal ratemaking authority to include all mixed volume sales by intrastate pipelines or local distribution companies, the regulation of which has been the historic preserve of the states." Order No. 102, 45 Fed. Reg. 67086 (1980).

The Court rejects this argument as "exaggerated" because certain downstream pipeline sales, such as those of gas which has not been commingled with purchased gas, receive an NGPA rate. *Ante*, at 340. But for this type of gas, Congress has made the judgment in § 2(21)(B) that the NGPA rate should govern. Applying the same principle to commingled gas, and most pipeline production falls within this category, would vastly expand the role of federal rates in what hitherto has been a sector regulated by the States. While § 602(a) of the NGPA allows the States to compete with the federal scheme by establishing price ceilings for the intrastate market that are lower than the federal NGPA ceiling, the Commission is fully justified in believing that it should not unnecessarily intrude into this sphere any further than actually required by the Act.

There is a second reasonable basis for the Commission's order that is submitted in this Court. The Commission argues that pipeline producers would enjoy an unintended windfall if they received first sale pricing. Since present cost-of-service pricing permits pipelines to recover costs needed to stimulate production, first sale prices are unnecessary to increase natural gas production by pipelines. *Supra*, at 347–348. Even if the windfall that would have been given for new gas were debatable, there can be no question that for gas already dedicated to interstate commerce on the date of enactment of the NGPA and subject to cost-of-service pricing, the affording of an NGPA price is nothing more than a gift. Accordingly, a number of state public service commissions, and municipal and other publicly owned energy systems which provide natural gas service to citizens, and would foot the bill for the windfall, have filed briefs as *amici curiae* in support of the Commission's position. In precluding this windfall, the Commission is fulfilling the purpose of the NGA "to protect consumers against exploitation at the hands of natural gas companies," *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610 (1944); *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1, 19 (1961), and "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges," *Atlantic Refining Co.* v. *Public Service Comm'n of New York*, 360 U. S. 378, 388 (1959). Nothing in the NGPA suggests an abandonment of the consumer protection rationale—the basis for regulating the industry in the first place. Thus, the Commission's order does not discourage pipeline production activity but only wisely minimizes the size of the price increases to that necessary to meet the NGPA's objectives.

The Court's rejection of this position is based on the fact that "the Commission does not pursue its windfall argument to its logical conclusion," *ante*, at 342, by denying NGPA prices to pipeline production sold at the wellhead. But when a pipeline sells gas at the wellhead it is acting much like an independent producer and it is reasonable for the Commission to have distinguished such sales from intracorporate transfers and downstream sales of intermingled gas. Similarly, the judgment that gas dedicated to a downstream contract was sufficiently similar to a wellhead sale to deserve first sale treatment does not undermine the Commission's decision not to give "first sale" treatment to gas which cannot be attributed solely to the pipelines' own production. In any event, the need to provide a partial windfall to comply with the Act hardly compels the agency to multiply the burden on consumers and industry which rely on natural gas for their energy needs.

III

Today the Court upsets the Commission's interpretation notwithstanding that it is undeniably supportable under the plain language of the statute, not contrary to the legislative history, and consistent with the Act's purpose to increase the supply of natural gas. In doing so, it rejects out-of-hand the Commission's laudable objectives in not unduly intruding into the sphere of state regulation and not granting the regulated industry an unwarranted windfall profit. I can recall no similar case in which we have overturned an agency's interpretation, and I respectfully dissent from this first and unfortunate instance.

JONES *v.* UNITED STATES

CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 81–5195. Argued November 2, 1982—Decided June 29, 1983

Under the District of Columbia Code, a criminal defendant may be acquitted by reason of insanity if his insanity is affirmatively established by a preponderance of the evidence. He is then committed to a mental hospital and within 50 days thereafter is entitled to a judicial hearing to determine his eligibility for release, at which he has the burden of proving by a preponderance of the evidence that he is no longer mentally ill or dangerous. The Code also provides that the acquittee is entitled to a judicial hearing every six months at which he may establish by a preponderance of the evidence that he is entitled to release. Petitioner was charged in the District of Columbia Superior Court with attempted petit larceny, a misdemeanor punishable by a maximum prison sentence of one year. The Superior Court found petitioner not guilty by reason of insanity and committed him to a mental hospital. At his subsequent 50-day hearing, the court found that he was mentally ill and constituted a danger to himself or others. A second release hearing was held after petitioner had been hospitalized for more than one year, the maximum period he could have spent in prison if he had been convicted. On that basis he demanded that he be released unconditionally or recommitted pursuant to the civil-commitment procedures under the District of Columbia Code, including a jury trial and clear and convincing proof by the Government of his mental illness and dangerousness. The Superior Court denied his request for a civil-commitment hearing, reaffirmed the findings made at the 50-day hearing, and continued his commitment. The District of Columbia Court of Appeals ultimately affirmed.

Held: When a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society. Pp. 361–370.

(a) A verdict of not guilty by reason of insanity is sufficiently probative of mental illness and dangerousness to justify commitment of the acquittee for the purposes of treatment and the protection of society. Such a verdict establishes that the defendant committed an act constituting a criminal offense, and that he committed the act because of mental illness. It was not unreasonable for Congress to determine that these findings constitute an adequate basis for hospitalizing the acquittee as a dangerous and mentally ill person. The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness. Nor is it unreasonable to conclude that an insanity acquittal supports an inference of continuing mental illness. The 50-day hearing assures that every acquittee has prompt opportunity to obtain release if he has recovered. Pp. 363–366.

(b) Indefinite commitment of an insanity acquittee, based on proof of insanity by only a preponderance of the evidence, comports with due process. *Addington* v. *Texas*, 441 U. S. 418, held that the government in a civil-commitment proceeding must demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous. However, the concerns critical to that decision—based on the risk of error that a person might be committed for mere "idiosyncratic behavior"—are diminished or absent in the case of insanity acquittees and do not require the same standard of proof in both cases. Proof that the acquittee committed a criminal act as a result of mental illness eliminates the risk that he is being committed for mere idiosyncratic behavior. Pp. 366–368.

(c) An insanity acquittee is not entitled to his release merely because he has been hospitalized for a period longer than he could have been incarcerated if convicted. The length of a sentence for a particular criminal offense is based on a variety of considerations, including retribution, deterrence, and rehabilitation. However, because an insanity acquittee was not convicted, he may not be punished. The purpose of his commitment is to treat his mental illness and protect him and society from his potential dangerousness. There simply is no necessary correlation between the length of the acquittee's hypothetical criminal sentence and the length of time necessary for his recovery. Pp. 368–369.

432 A. 2d 364, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 371. STEVENS, J., filed a dissenting opinion, *post*, p. 387.

Silas J. Wasserstrom argued the cause for petitioner. With him on the briefs were *William J. Mertens* and *A. Franklin Burgess, Jr.*

Joshua I. Schwartz argued the cause for the United States. With him on the brief were *Solicitor General Lee,* *Assistant Attorney General Jensen,* and *Deputy Solicitor General Frey.**

JUSTICE POWELL delivered the opinion of the Court.

The question presented is whether petitioner, who was committed to a mental hospital upon being acquitted of a criminal offense by reason of insanity, must be released because he has been hospitalized for a period longer than he might have served in prison had he been convicted.

I

In the District of Columbia a criminal defendant may be acquitted by reason of insanity if his insanity is "affirmatively established by a preponderance of the evidence." D. C. Code § 24–301(j) (1981).[1] If he successfully invokes the insanity defense, he is committed to a mental hospital. § 24–301(d)(1).[2] The statute provides several ways of ob-

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*Briefs of *amici curiae* urging reversal were filed by *Michael L. Burack, M. Carolyn Cox, Arthur B. Spitzer,* and *Charles S. Sims* for the American Civil Liberties Union et al.; and by *Joseph H. Rodriquez, Michael L. Perlin, Stanley C. Van Ness,* and *John J. Ensminger* for the Department of the Public Advocate, Division of Mental Health Advocacy, State of New Jersey.

Robert B. Remar filed a brief for the Georgia Legal Services Program, Inc., as *amicus curiae.*

[1] Section 24–301(j) provides:

"Insanity shall not be a defense in any criminal proceeding in the United States District Court for the District of Columbia or in the Superior Court of the District of Columbia, unless the accused or his attorney in such proceeding, at the time the accused enters his plea of not guilty or within 15 days thereafter or at such later time as the court may for good cause permit, files with the court and serves upon the prosecuting attorney written notice of his intention to rely on such defense. No person accused of an offense shall be acquitted on the ground that he was insane at the time of its commission unless his insanity, regardless of who raises the issue, is affirmatively established by a preponderance of the evidence."

[2] Section 24–301(d)(1) provides:

"If any person tried upon an indictment or information for an offense raises the defense of insanity and is acquitted solely on the ground that he was insane at the time of its commission, he shall be committed to a hospitaining release. Within 50 days of commitment the acquittee is entitled to a judicial hearing to determine his eligibility for release, at which he has the burden of proving by a preponderance of the evidence that he is no longer mentally ill or dangerous. § 24–301(d)(2).[3] If he fails to meet this burden at the 50-day hearing, the committed acquittee subsequently may be released, with court approval, upon certification of his recovery by the hospital chief of service. § 24–301(e).[4]

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tal for the mentally ill until such time as he is eligible for release pursuant to this subsection or subsection (e) of this section."

Under this provision, automatic commitment is permissible only if the defendant himself raised the insanity defense. See H. R. Rep. No. 91–907, p. 74 (1970); *Lynch* v. *Overholser*, 369 U. S. 705 (1962).

[3] Section 24–301(d)(2) provides in relevant part:

"(A) A person confined pursuant to paragraph (1) of this subsection shall have a hearing, unless waived, within 50 days of his confinement to determine whether he is entitled to release from custody. . . .

. . . . .

"(B) If the hearing is not waived, the court shall cause notice of the hearing to be served upon the person, his counsel, and the prosecuting attorney and hold the hearing. Within 10 days from the date the hearing was begun, the court shall determine the issues and make findings of fact and conclusions of law with respect thereto. The person confined shall have the burden of proof. If the court finds by a preponderance of the evidence that the person confined is entitled to his release from custody, either conditional or unconditional, the court shall enter such order as may appear appropriate."

The statute does not specify the standard for determining release, but the District of Columbia Court of Appeals held in this case that, as in release proceedings under § 24–301(e) and § 21–545(b), the confined person must show that he is either no longer mentally ill or no longer dangerous to himself or others. See 432 A. 2d 364, 372, and n. 16 (1981) (en banc).

[4] Section 24–301(e) provides in relevant part:

"Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certifies: (1) That such person has recovered his sanity; (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others; and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of the court in which the

Alternatively, the acquittee is entitled to a judicial hearing every six months at which he may establish by a preponderance of the evidence that he is entitled to release. § 24–301(k).[5]

Independent of its provision for the commitment of insanity acquittees, the District of Columbia also has adopted a civil-commitment procedure, under which an individual may be committed upon clear and convincing proof by the Govern-

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person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of 15 days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of 1 or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from further confinement in said hospital. If the court does not so find, the court shall order such person returned to said hospital. . . ."

[5] Section 24–301(k) provides in relevant part:

"(1) A person in custody or conditionally released from custody, pursuant to the provisions of this section, claiming the right to be released from custody, the right to any change in the conditions of his release, or other relief concerning his custody, may move the court having jurisdiction to order his release, to release him from custody, to change the conditions of his release, or to grant other relief.

. . . . .

"(3) . . . On all issues raised by his motion, the person shall have the burden of proof. If the court finds by a preponderance of the evidence that the person is entitled to his release from custody, either conditional or unconditional, a change in the conditions of his release, or other relief, the court shall enter such order as may appear appropriate.

. . . . .

"(5) A court shall not be required to entertain a 2nd or successive motion for relief under this section more often than once every 6 months. A court for good cause shown may in its discretion entertain such a motion more often than once every 6 months."

ment that he is mentally ill and likely to injure himself or others. § 21-545(b).[6] The individual may demand a jury in the civil-commitment proceeding. § 21-544. Once committed, a patient may be released at any time upon certification of recovery by the hospital chief of service. §§ 21-546, 21-548. Alternatively, the patient is entitled after the first 90 days, and subsequently at 6-month intervals, to request a judicial hearing at which he may gain his release by proving by a preponderance of the evidence that he is no longer mentally ill or dangerous. §§ 21-546, 21-547; see *Dixon* v. *Jacobs*, 138 U. S. App. D. C. 319, 328, 427 F. 2d 589, 598 (1970).

II

On September 19, 1975, petitioner was arrested for attempting to steal a jacket from a department store. The next day he was arraigned in the District of Columbia Superior Court on a charge of attempted petit larceny, a misdemeanor punishable by a maximum prison sentence of one year. §§ 22-103, 22-2202. The court ordered petitioner committed to St. Elizabeths, a public hospital for the mentally ill, for a determination of his competency to stand trial.[7] On March 1, 1976, a hospital psychologist submitted a report to the court stating that petitioner was competent to stand trial, that petitioner suffered from "Schizophrenia, paranoid type," and that petitioner's alleged offense was "the product of his mental disease." Record 51. The court ruled that petitioner was competent to stand trial. Petitioner subsequently decided to plead not guilty by reason of insanity. The Government did not contest the plea, and it entered into a stipulation of facts with petitioner. On March 12, 1976, the Superior Court found petitioner not guilty by reason of insanity and committed him to St. Elizabeths pursuant to §24–301(d)(1).

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[6] Section 21-545(b) provides in relevant part:

"If the court or jury finds that the person is mentally ill and, because of that illness, is likely to injure himself or other persons if allowed to remain at liberty, the court may order his hospitalization for an indeterminate period, or order any other alternative course of treatment which the court believes will be in the best interests of the person or of the public."

See *In re Nelson*, 408 A. 2d 1233 (D. C. 1979) (reading into the statute the due process requirement of "clear and convincing" proof).

[7] Section 24-301(a) authorizes the court to "order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital."

On May 25, 1976, the court held the 50-day hearing required by §24–301(d)(2)(A). A psychologist from St. Elizabeths testified on behalf of the Government that, in the opinion of the staff, petitioner continued to suffer from paranoid schizophrenia and that "because his illness is still quite active, he is still a danger to himself and to others." Tr. 9. Petitioner's counsel conducted a brief cross-examination, and presented no evidence.[8] The court then found that "the defendant-patient is mentally ill and as a result of his mental illness, at this time, he constitutes a danger to himself or others." *Id.*, at 13. Petitioner was returned to St. Elizabeths. Petitioner obtained new counsel and, following some procedural confusion, a second release hearing was held on February 22, 1977. By that date petitioner had been hospitalized for more than one year, the maximum period he could have spent in prison if he had been convicted. On that basis he demanded that he be released unconditionally or recommitted pursuant to the civil-commitment standards in §21–545(b), including a jury trial and proof by clear and convincing evidence of his mental illness and dangerousness. The Superior Court denied petitioner's request for a civil-commitment hearing, reaffirmed the findings made at the

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[8] Petitioner's counsel seemed concerned primarily about obtaining a transfer for petitioner to a less restrictive wing of the hospital. See Tr. 11–12.

May 25, 1976, hearing, and continued petitioner's commitment to St. Elizabeths.[9]

Petitioner appealed to the District of Columbia Court of Appeals. A panel of the court affirmed the Superior Court, 396 A. 2d 183 (1978), but then granted rehearing and reversed, 411 A. 2d 624 (1980). Finally, the court heard the case en banc and affirmed the judgment of the Superior Court. 432 A. 2d 364 (1981). The Court of Appeals rejected the argument "that the length of the prison sentence [petitioner] might have received determines when he is entitled to release or civil commitment under Title 24 of the D. C. Code." *Id.*, at 368. It then held that the various statutory differences between civil commitment and commitment of insanity acquittees were justified under the equal protection component of the Fifth Amendment. *Id.*, at 371–376.

We granted certiorari, 454 U. S. 1141 (1982), and now affirm.

III

It is clear that "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington* v. *Texas*, 441 U. S. 418, 425 (1979). Therefore, a State must have "a constitutionally adequate purpose for the confinement." *O'Connor* v. *Donaldson*, 422 U. S. 563, 574 (1975). Congress has determined that a criminal defendant found not guilty by reason of insanity in the District of Columbia should be committed indefinitely to a mental institution for treatment and the protection of society. See H. R. Rep. No. 91–907, pp. 73–74 (1970); 432 A. 2d, at 371 ("[T]he District of Columbia statutory scheme for commitment of insane criminals is . . . a regulatory, prophylactic statute, based on a legitimate governmental interest in protecting society and rehabilitating mental patients"). Petitioner does not contest the Government's authority to commit a mentally ill and dangerous person indefinitely to a mental institution, but rather contends that "the petitioner's trial was not a constitutionally adequate hearing to justify an indefinite commitment." Brief for Petitioner 14.

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[9] "A subsequent motion for unconditional release under § 301(k) was denied in March of 1977. Three months later, however, [petitioner] was granted conditional release on terms recommended by St. Elizabeths' staff, allowing daytime and overnight visits into the community. He was also admitted into the civil division of the hospital, though as a result of disruptive behavior, he was retransferred to the forensic division." 432 A. 2d, at 368, n. 6.

Petitioner's argument rests principally on *Addington* v. *Texas, supra,* in which the Court held that the Due Process Clause requires the State in a civil-commitment proceeding to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous. 441 U. S., at 426–427. Petitioner contends that these due process standards were not met in his case because the judgment of not guilty by reason of insanity did not constitute a finding of present mental illness and dangerousness and because it was established only by a preponderance of the evidence.[10] Peti-

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[10] In the Court of Appeals petitioner apparently based these arguments on equal protection rather than due process, arguing that it was irrational for the Government to deny him a civil-commitment hearing at which the Government bore the burden of proof by clear and convincing evidence. See *id.*, at 371. Both petitioner and the Government acknowledge that this equal protection argument essentially duplicates petitioner's due process argument. That is, if the Due Process Clause does not require that an insanity acquittee be given the particular procedural safeguards provided in a civil-commitment hearing under *Addington*, then there necessarily is a rational basis for equal protection purposes for distinguishing between civil commitment and commitment of insanity acquittees. See Reply Brief for Petitioner 22–23; Brief for United States 55. We agree, and therefore address petitioner's arguments in terms of the Due Process Clause.

Petitioner does raise one additional equal protection argument that stands on its own. The District of Columbia provides for a jury at civil-commitment hearings, see § 21–544, and petitioner contends that equal protection requires that insanity acquittees also be permitted to demand a jury at the 50-day hearing. Because we determine that an acquittee's commitment is based on the judgment of insanity at the criminal trial, rather than solely on the findings at the 50-day hearing, see *infra*, at 363–366, the relevant equal protection comparison concerns the procedures available at the criminal trial and at a civil-commitment hearing. We therefore tioner then concludes that the Government's only conceivably legitimate justification for automatic commitment is to ensure that insanity acquittees do not escape confinement entirely, and that this interest can justify commitment at most for a period equal to the maximum prison sentence the acquittee could have received if convicted. Because petitioner has been hospitalized for longer than the one year he might have served in prison, he asserts that he should be released unconditionally or recommitted under the District's civil-commitment procedures.[11]

A

We turn first to the question whether the finding of insanity at the criminal trial is sufficiently probative of mental illness and dangerousness to justify commitment. A verdict of not guilty by reason of insanity establishes two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness.

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agree with the Court of Appeals that the absence of a jury at the 50-day hearing "is justified by the fact that the acquittee has had a right to a jury determination of his sanity at the time of the offense." 432 A. 2d, at 373.

[11] It is important to note what issues are not raised in this case. Petitioner has not sought appellate review of the Superior Court's findings in 1976 and 1977 that he remained mentally ill and dangerous, and, indeed, the record does not indicate that since 1977 he ever has sought a release hearing—a hearing to which he was entitled every six months.

Nor are we asked to decide whether the District's procedures for release are constitutional. As noted above, see *supra*, at 357–359, the basic standard for release is the same under either civil commitment or commitment following acquittal by reason of insanity: the individual must prove by a preponderance of the evidence that he is no longer dangerous or mentally ill. There is an important difference, however, in the release provisions for these two groups. A patient who is committed civilly is entitled to unconditional release upon certification of his recovery by the hospital chief of service, see § 21–546, whereas a committed insanity acquittee may be released upon such certification only with court approval, see § 24–301(e). Neither of these provisions is before the Court, as petitioner has challenged neither the adequacy of the release standards generally nor the disparity in treatment of insanity acquittees and other committed persons. See 432 A. 2d, at 373, n. 19.

Congress has determined that these findings constitute an adequate basis for hospitalizing the acquittee as a dangerous and mentally ill person. See H. R. Rep. No. 91-907, *supra*, at 74 (expressing fear that "dangerous criminals, particularly psychopaths, [may] win acquittals of serious criminal charges on grounds of insanity" and yet "escape hospital commitment"); S. Rep. No. 1170, 84th Cong., 1st Sess., 13 (1955) ("Where [the] accused has pleaded insanity as a defense to a crime, and the jury has found that the defendant was, in fact, insane at the time the crime was committed, it is just and reasonable in the Committee's opinion that the insanity, once established, should be presumed to continue and that the accused should automatically be confined for treatment until it can be shown that he has recovered"). We cannot say that it was unreasonable and therefore unconstitutional for Congress to make this determination.

The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness.[12] See *Lynch* v. *Overholser*, 369 U. S. 705, 714 (1962) (The fact that the accused was found to have committed a criminal act is "strong evidence that his continued liberty could imperil 'the preservation of public peace'"). Indeed, this concrete evidence generally may be at least as persuasive as any predictions about dangerousness that might be made in a civil-commitment proceeding.[13] We do not agree with petitioner's suggestion that the requisite dangerousness is not established by proof that a person committed a nonviolent crime against property. This Court never has held that "violence," however that term might be defined, is a prerequisite for a constitutional commitment.[14]

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[12] The proof beyond a reasonable doubt that the acquittee committed a criminal act distinguishes this case from *Jackson* v. *Indiana*, 406 U. S. 715 (1972), in which the Court held that a person found incompetent to stand trial could not be committed indefinitely solely on the basis of the finding of incompetency. In *Jackson* there never was any affirmative proof that the accused had committed criminal acts or otherwise was dangerous.

[13] In attacking the predictive value of the insanity acquittal, petitioner complains that "[w]hen Congress enacted the present statutory scheme, it did not cite any empirical evidence indicating that mentally ill persons who have committed a criminal act are likely to commit additional dangerous acts in the future." Reply Brief for Petitioner 13. He further argues that the available research fails to support the predictive value of prior danger-

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ous acts. See *id.*, at 13–14. We do not agree with the suggestion that Congress' power to legislate in this area depends on the research conducted by the psychiatric community. We have recognized repeatedly the "uncertainty of diagnosis in this field and the tentativeness of professional judgment. The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment . . . ." *Greenwood* v. *United States*, 350 U. S. 366, 375 (1956). See *Estelle* v. *Smith*, 451 U. S. 454, 472 (1981); *Addington* v. *Texas*, 441 U. S. 418, 429–430 (1979); *Powell* v. *Texas*, 392 U. S. 514, 535–537 (1968) (plurality opinion). The lesson we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments.

[14] See *Overholser* v. *O'Beirne*, 112 App. D. C. 267, 276, 302 F. 2d 852, 861 (1961) (Burger, J.) ("[T]o describe the theft of watches and jewelry as 'non-dangerous' is to confuse danger with violence. Larceny is usually less violent than murder or assault, but in terms of public policy the purpose of the statute is the same as to both") (footnote omitted). Thus, the "danger" may be to property rights as well as to persons. It also may be noted that crimes of theft frequently may result in violence from the efforts of the criminal to escape or the victim to protect property or the police to apprehend the fleeing criminal.

The relative "dangerousness" of a particular individual, of course, should be a consideration at the release hearings. In this context, it is noteworthy that petitioner's continuing commitment may well rest in significant part on evidence independent of his acquittal by reason of insanity of the crime of attempted larceny. In December 1976 a medical officer at St. Elizabeths reported that petitioner "has a history of attempted suicide." Record 87. In addition, petitioner at one point was transferred to the civil division of the hospital, but was transferred back to the forensic division because of disruptive behavior. See n. 9, *supra*. The Government also advises that after petitioner was released unconditionally following the second panel decision below, he had to be recommitted on an emergency civil basis two weeks later for conduct unrelated to the original commitment. See Brief for United States 15, n. 18.

Nor can we say that it was unreasonable for Congress to determine that the insanity acquittal supports an inference of continuing mental illness. It comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment. The precise evidentiary force of the insanity acquittal, of course, may vary from case to case, but the Due Process Clause does not require Congress to make classifications that fit every individual with the same degree of relevance. See *Marshall* v. *United States*, 414 U. S. 417, 428 (1974). Because a hearing is provided within 50 days of the commitment, there is assurance that every acquittee has prompt opportunity to obtain release if he has recovered.

Petitioner also argues that, whatever the evidentiary value of the insanity acquittal, the Government lacks a legitimate reason for committing insanity acquittees automatically because it can introduce the insanity acquittal as evidence in a subsequent civil proceeding. This argument fails to consider the Government's strong interest in avoiding the need to conduct a *de novo* commitment hearing following every insanity acquittal—a hearing at which a jury trial may be demanded, § 21–544, and at which the Government bears the burden of proof by clear and convincing evidence. Instead of focusing on the critical question whether the acquittee has recovered, the new proceeding likely would have to relitigate much of the criminal trial. These problems accent the Government's important interest in automatic commitment. See *Mathews* v. *Eldridge*, 424 U. S. 319, 348 (1976). We therefore conclude that a finding of not guilty by reason of insanity is a sufficient foundation for commitment of an insanity acquittee for the purposes of treatment and the protection of society.

B

Petitioner next contends that his indefinite commitment is unconstitutional because the proof of his insanity was based only on a preponderance of the evidence, as compared to

Addington's civil-commitment requirement of proof by clear and convincing evidence. In equating these situations, petitioner ignores important differences between the class of potential civil-commitment candidates and the class of insanity acquittees that justify differing standards of proof. The *Addington* Court expressed particular concern that members of the public could be confined on the basis of "some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable." 441 U. S., at 426–427. See also *O'Connor* v. *Donaldson*, 422 U. S., at 575. In view of this concern, the Court deemed it inappropriate to ask the individual "to share equally with society the risk of error." *Addington*, 441 U. S., at 427. But since automatic commitment under § 24–301(d)(1) follows only if the *acquittee himself* advances insanity as a defense and proves that his criminal act was a product of his mental illness,[15] there is good reason for diminished concern as to the risk of error.[16] More important, the proof that he committed a criminal act as a result of mental illness eliminates the risk that he is being committed for mere "idiosyncratic behavior," *Addington*, 441 U. S., at 427. A criminal act by definition is not "within a range of conduct that is generally acceptable." *Id.*, at 426–427.

We therefore conclude that concerns critical to our decision in *Addington* are diminished or absent in the case of insanity acquittees. Accordingly, there is no reason for adopting the same standard of proof in both cases. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). The preponderance of the evidence standard comports with due process for commitment of insanity acquittees.[17]

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[15] See n. 2, *supra*. In this case petitioner stipulated that he had committed the offense by reason of insanity.

[16] That petitioner raised the insanity defense also diminishes the significance of the deprivation. The *Addington* Court noted that the social stigma of civil commitment "can have a very significant impact on the individual." 441 U. S., at 426. A criminal defendant who successfully raises the insanity defense necessarily is stigmatized by the verdict itself, and thus the commitment causes little additional harm in this respect.

C

The remaining question is whether petitioner nonetheless is entitled to his release because he has been hospitalized for a period longer than he could have been incarcerated if convicted. The Due Process Clause "requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson* v. *Indiana*, 406 U. S. 715, 738 (1972). The purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness. The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous. See *O'Connor* v. *Donaldson*, *supra*, at 575–576; 432 A. 2d, at 372, and n. 16; H. R. Rep. No. 91–907, pp. 73–74 (1970). And because it is impossible to predict how long it will take for any given individual to recover—or indeed whether he ever will recover—Congress has chosen, as it has with respect to civil commitment, to leave the length of commitment indeterminate, subject to periodic review of the patient's suitability for release.

In light of the congressional purposes underlying commitment of insanity acquittees, we think petitioner clearly errs in contending that an acquittee's hypothetical maximum sentence provides the constitutional limit for his commitment. A particular sentence of incarceration is chosen to reflect society's view of the proper response to commission of a particular criminal offense, based on a variety of considerations such as retribution, deterrence, and rehabilitation. See, *e. g.*, *Gregg* v. *Georgia*, 428 U. S. 153, 183–186 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168 (1963); *Williams* v. *New York*, 337 U. S. 241, 248–249 (1949). The State may punish a person convicted of a crime even if satisfied that he is unlikely to commit further crimes.

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[17] A defendant could be required to prove his insanity by a higher standard than a preponderance of the evidence. See *Leland* v. *Oregon*, 343 U. S. 790, 799 (1952). Such an additional requirement hardly would benefit a criminal defendant who wants to raise the insanity defense, yet imposition of a higher standard would be a likely legislative response to a holding that an insanity acquittal could support automatic commitment only if the verdict were supported by clear and convincing evidence.

Different considerations underlie commitment of an insanity acquittee. As he was not convicted, he may not be punished.[18] His confinement rests on his continuing illness and dangerousness. Thus, under the District of Columbia statute, no matter how serious the act committed by the acquittee, he may be released within 50 days of his acquittal if he has recovered. In contrast, one who committed a less serious act may be confined for a longer period if he remains ill and dangerous. There simply is no necessary correlation between severity of the offense and length of time necessary for recovery. The length of the acquittee's hypothetical criminal sentence therefore is irrelevant to the purposes of his commitment.[19]

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[18] As the Court of Appeals held below, "[s]ociety may not excuse a defendant's criminal behavior because of his insanity and at the same time punish him for invoking an insanity defense." 432 A. 2d, at 369.

[19] The Court has held that a convicted prisoner may be treated involuntarily for particular psychiatric problems, but that upon expiration of his prison sentence he may be committed only as would any other candidate for civil commitment. See *McNeil* v. *Director, Patuxent Institution*, 407 U. S. 245 (1972); *Humphrey* v. *Cady*, 405 U. S. 504 (1972); *Baxstrom* v. *Herold*, 383 U. S. 107 (1966). None of those cases involved an insanity acquittee, and none suggested that a person under noncriminal confinement could not be hospitalized in excess of the period for which he could have served in prison if convicted for the dangerous acts he had committed.

The inherent fallacy of relying on a criminal sanction to determine the length of a therapeutic confinement is manifested by petitioner's failure to suggest any clear guidelines for deciding when a patient must be released. For example, he does not suggest whether the Due Process Clause would require States to limit commitment of insanity acquittees to maximum sen-

IV

We hold that when a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society. This holding accords with the widely and reasonably held view that insanity acquittees constitute a special class that should be treated differently from other candidates for commitment.[20] We have observed before that "[w]hen Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation . . . ." *Marshall* v. *United States*, 414 U. S., at 427. This admonition has particular force in the context of legislative efforts to deal with the special problems raised by the insanity defense.

The judgment of the District of Columbia Court of Appeals is

Affirmed.

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tences or minimum sentences. Nor does he explain what should be done in the case of indeterminate sentencing or suggest whether account would have to be taken of the availability of release time or the possibility of parole. And petitioner avoids entirely the important question how his theory would apply to those persons who committed especially serious criminal acts. Petitioner thus would leave the States to speculate how they may deal constitutionally with acquittees who might have received life imprisonment, life imprisonment without possibility of parole, or the death penalty.

[20] A recent survey of commitment statutes reported that 14 jurisdictions provide automatic commitment for at least some insanity acquittees, while many other States have a variety of special methods of committing insanity acquittees. See Note, Commitment Following an Insanity Acquittal, 94 Harv. L. Rev. 605, 605–606, and nn. 4–6 (1981). Nineteen States commit insanity acquittees under the same procedures used for civil commitment. *Id.*, at 605, n. 3. It appears that only one State has enacted into law petitioner's suggested requirement that a committed insanity acquittee be released following expiration of his hypothetical maximum criminal sentence. See Conn. Gen. Stat. § 53a–47(b) (1981).

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

The Court begins by posing the wrong question. The issue in this case is not whether petitioner must be released because he has been hospitalized for longer than the prison sentence he might have served had he been convicted, any more than the question in a motion to suppress an allegedly coerced confession at a murder trial is whether the murderer should go free.[1] The question before us is whether the fact that an individual has been found "not guilty by reason of insanity," by itself, provides a constitutionally adequate basis for involuntary, indefinite commitment to psychiatric hospitalization.

None of our precedents directly addresses the meaning of due process in the context of involuntary commitments of persons who have been acquitted by reason of insanity. Petitioner's argument rests primarily on two cases dealing with civil commitments: *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975), and *Addington* v. *Texas*, 441 U. S. 418 (1979). *O'Connor* held that a mentally ill individual has a "right to liberty" that a State may not abridge by confining him to a mental institution, even for the purpose of treating his illness, unless in addition to being mentally ill he is likely to harm himself or others if released. 422 U. S., at 573–576; see *id.*, at 589 (BURGER, C. J., concurring). Then, in *Addington*, we carefully evaluated the standard of proof in civil commitment proceedings. Applying the due process analysis of *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976), we held that "due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence," 441 U. S., at 427, specifically "clear and convincing evidence," *id.*, at 433.[2]

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[1] If we were to determine that the standards under which petitioner was committed did not satisfy the Due Process Clause, he would be "released" only in the most formalistic sense of the word. Realistically, he would probably be recommitted, assuming that the Government could carry its burden of proof at a regular civil commitment hearing. The facts that the Court discusses *ante*, at 365, n. 14, would certainly be relevant at such a hearing. But they are irrelevant to the question before us because they have never been assessed under the "clear and convincing" evidence standard.

The core of both cases is a balance of three factors: the governmental interest in isolating and treating those who may be mentally ill and dangerous; the difficulty of proving or disproving mental illness and dangerousness in court; and the massive intrusion on individual liberty that involuntary psychiatric hospitalization entails. Petitioner contends that the same balance must be struck in this case, and that the Government has no greater interest in committing him indefinitely than it has in ordinary civil commitment cases governed by the standards of *O'Connor* and *Addington*. While conceding that the Government may have legitimate reasons to commit insanity acquittees for some definite period without carrying the burden of proof prescribed in *Addington*,[3] he argues that he cannot be confined indefinitely unless the Government accords him the minimum due process protections required for civil commitment.

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[2] We held that a "preponderance of the evidence" standard was not sufficient to preserve fundamental fairness to candidates for civil commitment in light of their strong interest in avoiding involuntary confinement and psychiatric treatment. See 441 U. S., at 427; cf. *Santosky* v. *Kramer*, 455 U. S. 745, 766–770 (1982). Yet to require as a constitutional matter more than clear and convincing evidence—*i. e.*, proof beyond a reasonable doubt—would unduly impair governmental efforts to protect both the mentally ill and society at large. See 441 U. S., at 427–431.

[3] Petitioner does not dispute that the Government may commit him solely on the basis of his insanity acquittal for a definite period—as long as he could have been incarcerated had he been convicted on the criminal charges against him rather than acquitted by reason of insanity. The issue, therefore, is not whether due process forbids treating insanity acquittees differently from other candidates for commitment. Petitioner is willing to concede that they may be treated differently for some purposes, and for a limited period of time. The dispute before us, rather, concerns the question whether the differences between insanity acquittees and other candidates for civil commitment justify committing insanity acquittees *indefinitely*, as D. C. Code § 24–301 (1981) provides, without the Government *ever* having to meet the procedural requirements of *Addington*.

A

The obvious difference between insanity acquittees and other candidates for civil commitment is that, at least in the District of Columbia, an acquittal by reason of insanity implies a determination beyond a reasonable doubt that the defendant in fact committed the criminal act with which he was charged. See *Bethea* v. *United States*, 365 A. 2d 64, 93–95 (D. C. 1976); D. C. Code §24–301(c) (1981). Conceivably, the Government may have an interest in confining insanity acquittees to punish them for their criminal acts, but the Government disclaims any such interest, and the Court does not rely on it.[4] In any event, we have held that the Govern-

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A number of our decisions have countenanced involuntary commitment without the full protections of *Addington* and *O'Connor*, but for the most part these have involved persons already in custody and strictly limited periods of psychiatric institutionalization. *E. g.*, *Jackson* v. *Indiana*, 406 U. S. 715, 738 (1972) (acknowledging that the State's interest in determining whether an accused would become competent to stand trial in the foreseeable future justified commitment "for a reasonable period of time"); *McNeil* v. *Director, Patuxent Institution*, 407 U. S. 245, 249–250 (1972) (accepting the legitimacy of short-term commitment of a convicted criminal for psychiatric evaluation); *Humphrey* v. *Cady*, 405 U. S. 504, 510 (1972) (commitment of convicted sex offender, limited to duration of sentence); *Baxstrom* v. *Herold*, 383 U. S. 107, 111 (1966) (commitment of prison inmates who are determined to be mentally ill during their prison term). See also *Parham* v. *J. R.*, 442 U. S. 584, 617–619 (1979) (wards of the State); Note, 31 Stan. L. Rev. 425 (1979) (burden and standard of proof in short-term civil commitment).

[4] Punishing someone acquitted by reason of insanity would undoubtedly implicate important constitutional concerns. It is questionable that confinement to a mental hospital would pass constitutional muster as appropriate punishment for any crime. The insanity defense has traditionally been viewed as premised on the notion that society has no interest in punishing insanity acquittees, because they are neither blameworthy nor the appro-

ment may not impose psychiatric commitment as an alternative to penal sentencing for longer than the maximum period of incarceration the legislature has authorized as punishment for the crime committed. *Humphrey* v. *Cady*, 405 U. S. 504, 510–511 (1972). Once Congress has defined a crime and the punishment for that crime, additional confinement can be justified only by proof beyond a reasonable doubt of additional facts, subject to the limits of the Double Jeopardy Clause, and upon notice to defendants that they are subject to such additional punishment. See *Specht* v. *Patterson*, 386 U. S. 605, 610 (1967); *In re Winship*, 397 U. S. 358, 361–364 (1970).

B

Instead of relying on a punishment rationale, the Court holds that a finding of insanity at a criminal trial "is sufficiently probative of mental illness and dangerousness to justify commitment." *Ante*, at 363. First, it declares that "[t]he fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness." *Ante*, at 364. Second, the Court decides that "[i]t comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment." *Ante*, at 366. Despite their superficial appeal, these propositions cannot support the decision necessary to the Court's disposition of this case—that the Government may be excused from carrying the *Addington* burden of proof with respect to each of the *O'Connor* elements of mental illness and dangerousness in committing petitioner for an indefinite period.

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priate objects of deterrence. See A. Goldstein, The Insanity Defense 15 (1967). In addition, insanity and *mens rea* stand in a close relationship, which this Court has never fully plumbed. See *Powell* v. *Texas*, 392 U. S. 514, 536–537 (1968) (opinion of MARSHALL, J.); *Leland* v. *Oregon*, 343 U. S. 790, 800 (1952); cf. *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975).

1. Our precedents in other commitment contexts are inconsistent with the argument that the mere facts of past criminal behavior and mental illness justify indefinite commitment without the benefits of the minimum due process standards associated with civil commitment, most importantly proof of present mental illness and dangerousness by clear and convincing evidence.[5] In *Addington* itself, the petitioner did not dispute that he had engaged in a wide variety of assaultive conduct that could have been the basis for criminal charges had the State chosen to prosecute him. See 441 U. S., at 420–421. Similarly, the petitioner in *Jackson* v. *Indiana*, 406 U. S. 715 (1972), had been charged with two robberies, yet we required the State to follow its civil commitment procedures if it wished to commit him for more than a strictly limited period. *Id.*, at 729–730. As the Court indicates, see *ante*, at 364, n. 12, these cases are perhaps distinguishable on the ground that there was never proof that a *crime* had been committed, although in *Addington* the petitioner's violent acts were before the jury. That objection, however, cannot be leveled at *Baxstrom* v. *Herold*, 383 U. S. 107 (1966), or *Humphrey* v. *Cady*, *supra.*

The petitioner in *Baxstrom* had been convicted of assault and sentenced to a term in prison, during which he was certified as insane by a prison physician. At the expiration of his criminal sentence, he was committed involuntarily to a state mental hospital under procedures substantially less protective than those used for civil commitment. 383 U. S., at

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[5] Many of these decisions rely on the Equal Protection Clause of the Fourteenth Amendment as well as, or instead of, the Due Process Clause. As in *Bearden* v. *Georgia*, 461 U. S. 660, 665 (1983), "[d]ue process and equal protection principles converge in the Court's analysis of these cases," and under our current understanding of the meaning of these Clauses it is perhaps more appropriate to focus primarily on due process considerations. With the exception of petitioner's argument that he should receive a jury trial, see n. 17, *infra*, there is no difference between the forms of relief he seeks under the separate theories. Cf. *ante*, at 362–363, n. 10.

108–110. We held that, once he had served his sentence, Baxstrom could not be treated differently from other candidates for civil commitment. *Id.*, at 112–113. The principal difference between this case and *Baxstrom* is petitioner's admission, intrinsic to an insanity plea in the District of Columbia at the time of his trial, that his crime was "the product" of his mental illness. *Humphrey*, however, indicates the limited importance of that distinction.

In *Humphrey*, the petitioner had been convicted of contributing to the delinquency of a minor, the court had determined that his crime was "probably directly motivated by a desire for sexual excitement," and the State had established his "need" for psychiatric treatment by a preponderance of the evidence at a special hearing. 405 U. S., at 506–507. He was committed for treatment for the maximum period for which he could have been incarcerated as punishment for his crime—as in this case, one year—and at the end of that period his commitment was renewed for five more years after a judicial hearing on his present mental illness and dangerousness. See *id.*, at 507. Thus, the situation was almost precisely identical to that in this case after petitioner's February 1977 hearing—the defendant had been found to have committed a criminal act beyond a reasonable doubt, a connection between that act and a mental disorder had been established by a preponderance of the evidence, and he had been confined for longer than the maximum sentence he could have received. If anything, Humphrey had received *more* protections than Michael Jones; the State had borne the burden of proof by a preponderance of the evidence at his "release hearing," *ibid.*, and his recommitment was for a strictly limited time. Nevertheless, we held that Humphrey's constitutional challenge to the renewal order had substantial merit, because Humphrey had not received the procedural protections given persons subject to civil commitment.[6]

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[6] In *Humphrey*, we held only that the petitioner had raised a substantial constitutional claim and that the Court of Appeals had erred in refusing to certify probable cause for an appeal from the District Court's dismissal of

2. The Government's interests in committing petitioner are the same interests involved in *Addington*, *O'Connor*, *Baxstrom*, and *Humphrey*—isolation, protection, and treatment of a person who may, through no fault of his own, cause harm to others or to himself. Whenever involuntary commitment is a possibility, the Government has a strong interest in accurate, efficient commitment decisions. Nevertheless, *Addington* held both that the government's interest in accuracy was not impaired by a requirement that it bear the burden of persuasion by clear and convincing evidence, and that the individual's interests in liberty and autonomy required the government to bear at least that burden. An acquittal by reason of insanity of a single, nonviolent misdemeanor is not a constitutionally adequate substitute for the due process protections of *Addington* and *O'Connor*, *i. e.*, proof by clear and convincing evidence of present mental illness or dangerousness, with the government bearing the burden of persuasion.

A "not guilty by reason of insanity" verdict is backward-looking, focusing on one moment in the past, while commitment requires a judgment as to the present and future. In some jurisdictions, most notably in federal criminal trials, an acquittal by reason of insanity may mean only that a jury found a reasonable doubt as to a defendant's sanity and as to the causal relationship between his mental condition and his crime. See *Davis* v. *United States*, 160 U. S. 469 (1895). As we recognized in *Addington*, "[t]he subtleties and nuances

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his habeas corpus petition. See 405 U. S., at 506–508. We remanded for an evidentiary hearing. Under today's ruling, however, it is difficult to see how a constitutional claim like the one made in *Humphrey* could conceivably have merit, unless there is somehow a constitutional difference between Colorado's pre-1972 "mentally disordered sex offender" statute and the District of Columbia's "not guilty by reason of insanity" statute. Both statutes were designed to authorize involuntary commitment for psychiatric treatment of persons who have committed crimes upon a finding by a preponderance of the evidence that the crime was the product of a mental condition appropriate for psychiatric therapy.

of psychiatric diagnosis render certainties virtually beyond reach in most situations." 441 U. S., at 430. The question is not whether "government may not act in the face of this uncertainty," *ante*, at 365, n. 13; everyone would agree that it can. Rather, the question is whether—in light of the uncertainty about the relationship between petitioner's crime, his present dangerousness, and his present mental condition—the Government can force him for the rest of his life "to share equally with society the risk of error," 441 U. S., at 427.[7]

It is worth examining what is known about the possibility of predicting dangerousness from *any* set of facts. Although a substantial body of research suggests that a consistent pattern of violent behavior may, from a purely statistical standpoint, indicate a certain likelihood of further violence in the future,[8] mere statistical validity is far from perfect for purposes of predicting which individuals will be dangerous. Commentators and researchers have long acknowledged that even the best attempts to identify dangerous individuals on the basis of specified facts have been inaccurate roughly two-thirds of the time, almost always on the side of overprediction.[9] On a clinical basis, mental health professionals can diagnose past or present mental condition with some confidence, but strong institutional biases lead them to err when they attempt to determine an individual's dangerousness, especially when the consequence of a finding of dangerousness is that an obviously mentally ill patient will remain within their control.[10] Research is practically nonexistent on the relationship of *nonviolent* criminal behavior, such as petitioner's attempt to shoplift, to future dangerousness. We do not even know whether it is even statistically valid as a predictor of similar nonviolent behavior, much less of behavior posing more serious risks to self and others.

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[7] Indeed, the District of Columbia's commitment scheme for insanity acquittees, unlike the civil commitment statute applied in *Addington*, permanently places the burden of persuasion on petitioner, thus forcing him to bear the lion's share of the risk.

[8] J. Monahan, The Clinical Prediction of Violent Behavior 71, 80–81 (NIMH 1980) (Monahan); see, *e. g.*, Cocozza, Melick, & Steadman, Trends in Violent Crime Among Ex-Mental Patients, 16 Criminology 317 (1978) (Cocozza); Pasewark, Pantle, & Steadman, The Insanity Plea in New York State, 51 N. Y. St. B. J. 186, 221–222 (1979).

[9] See American Psychiatric Assn., Task Force Report on Clinical Aspects of the Violent Individual 24 (1974) (APA Task Force Report); Monahan 44–61; Diamond, The Psychiatric Prediction of Dangerousness, 123 U. Pa. L. Rev. 439, 447 (1974); Note, Rules for an Exceptional Class: The Commitment and Release of Persons Acquitted of Violent Offenses by Reason of Insanity, 57 N. Y. U. L. Rev. 281, 298–299 (1982). See also Megargee, The Prediction of Dangerous Behavior, 3 Crim. Justice & Behavior 3, 11 (1976) ("Whatever the behavior sample the clinician selects,

Even if an insanity acquittee remains mentally ill, so long as he has not repeated the same act since his offense the passage of time diminishes the likelihood that he will repeat it.[11] Furthermore, the *frequency* of prior violent behavior is an important element in any attempt to predict future violence.[12] Finally, it cannot be gainsaid that some crimes are more indicative of dangerousness than others. Subject to the limits of *O'Connor*, a State may consider nonviolent misdemeanors "dangerous," but there is room for doubt whether a single attempt to shoplift and a string of brutal murders are equally

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it is no secret that the validity of our assessment techniques is less than perfect, and too often less than satisfactory").

[10] See APA Task Force Report 25; Monahan & Cummings, Prediction of Dangerousness as a Function of its Perceived Consequences, 2 J. Crim. Justice 239 (1974). The record of this case strongly suggests that petitioner has been the victim of such bias. At petitioner's first post-commitment hearing, a St. Elizabeths staff psychologist first testified that "because his illness is still quite active, he is still a danger to himself and to others," then explained that "[w]e would like to keep him still at the hospital and work with him." Tr. 9 (May 25, 1976).

[11] Monahan 52, 72; Rubin, Prediction of Dangerousness in Mentally Ill Criminals, 27 Archives of General Psychiatry 397, 401–406 (1972). See also Quinsey, The Baserate Problem and the Prediction of Dangerousness: A Reappraisal, 8 J. Psychiatry & Law 329 (1980).

[12] See Monahan 107. The Cocozza study showed that ex-mental patients with a single prior arrest were slightly less likely than members of the general population to be arrested for a violent crime.

accurate and equally permanent predictors of dangerousness.[13] As for mental illness, certainly some conditions that satisfy the "mental disease" element of the insanity defense do not persist for an extended period—thus the traditional inclusion of "temporary insanity" within the insanity defense.

Close reading of the Court's opinion reveals the utter emptiness of the legislative judgment it finds so unproblematic. Today's decision may overrule *Humphrey* by implication. It does not, however, purport to overrule *Baxstrom* or any of the cases which have followed *Baxstrom*.[14] It is clear, therefore, that the separate facts of criminality and mental illness cannot support indefinite psychiatric commitment, for both were present in *Baxstrom*. The Court's careful phrasing indicates as much: "someone *whose mental illness was sufficient to lead him to commit a criminal act* is likely to remain ill and in need of treatment." *Ante*, at 366 (emphasis added). The Court relies on a *connection* between mental condition and criminal conduct that is unique to verdicts of "not guilty by reason of insanity." Yet the relevance of that connection, as opposed to each of its separate components, is far from a matter of obvious "common sense." None of the available evidence that criminal behavior by the mentally ill is likely to repeat itself distinguishes between behaviors that were "the product" of mental illness and those that were not.[15] It is completely unlikely that persons acquitted by reason of insanity display a rate of future "dangerous" activity higher than civil committees with similar arrest records, or than persons convicted of crimes who are later found to be mentally ill. The causal connection between mental condition and criminal behavior that "not guilty by reason of insanity" formulations universally include is more a social judgment than a sound basis for determining dangerousness.

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[13] The Court responds that "crimes of theft frequently may result in violence." *Ante*, at 365, n. 14. When they do, that fact may well be relevant to, or even dispositive of, the dangerousness issue at a proper commitment hearing. In this case, however, petitioner's attempt to shoplift involved neither actual violence nor any attempt to resist or evade arrest. It is difficult to see how the Court's generalization justifies relieving the Government of its *Addington-O'Connor* burden of proving present dangerousness by clear and convincing evidence.

[14] *E. g., Jackson* v. *Indiana*, 406 U. S., at 723–730; *Waite* v. *Jacobs*, 154 U. S. App. D. C. 281, 475 F. 2d 392 (1973); *United States* v. *Brown*, 155 U. S. App. D. C. 402, 478 F. 2d 606 (1973). See also *McNeil* v. *Director, Patuxent Institution*, 407 U. S., at 249–250.

[15] See generally the sources cited in nn. 8–10, *supra*. To date, no one has established a connection between violence and psychiatric disorders.

Given the close similarity of the governmental interests at issue in this case and those at issue in *Addington*, and the highly imperfect "fit" between the findings required for an insanity acquittal and those required under *O'Connor* to support an indefinite commitment, I cannot agree that the Government should be excused from the burden that *Addington* held was required by due process.[16]

3. In considering the requirements of due process, we have often inquired whether alternative procedures more protective of individual interests, at a reasonable cost, were likely to accomplish the State's legitimate objectives. See,

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APA Task Force Report 30; Cocozza 330; Rabkin, Criminal Behavior of Discharged Mental Patients: A Critical Appraisal of the Research, 86 Psych. Bull. 1 (1979).

[16] Note that extended institutionalization may effectively make it impossible for an individual to prove that he is no longer mentally ill and dangerous, both because it deprives him of the economic wherewithal to obtain independent medical judgments and because the treatment he receives may make it difficult to demonstrate recovery. The current emphasis on using psychotropic drugs to eliminate the characteristic signs and symptoms of mental illness, especially schizophrenia, may render mental patients docile and unlikely to engage in violent or bizarre behaviors while they are institutionalized, but it does not "cure" them or allow them to demonstrate that they would remain nonviolent if they were not drugged. See American Psychiatric Assn., Statement on the Insanity Defense 15–16 (1982). At petitioner's May 1976 hearing, the Government relied on testimony that petitioner was "not always responsive in a positive way to what goes on" and was "not a very active participant in the informal activities on the Ward" to support its contention that he had not recovered. See Tr. 7–9. The amount of medication he was receiving, however, made it unlikely he could be an active participant in anything. See n. 19, *infra*.

e. g., *Mathews* v. *Eldridge*, 424 U. S., at 335; *Stanley* v. *Illinois*, 405 U. S. 645, 657–658 (1972); *Bell* v. *Burson*, 402 U. S. 535, 542–543 (1971). There are many ways to take into account criminal behavior and past mental condition, and thereby to vindicate the government's legitimate interest in accurate commitment decisions, without depriving insanity acquittees of the *Addington* protections. Certain aspects of the District of Columbia's commitment procedures already embody less restrictive alternatives: all insanity acquittees are committed automatically for 50 days before an initial release hearing, § 24–301(d), and the testimony of mental health professionals at all hearings may be informed by their experience with mentally ill patients and by their familiarity with current research. The fact of an insanity acquittal and the evidence on insanity adduced at trial are clearly admissible in all commitment and release hearings.

In addition, an insanity acquittal might conceivably justify commitment for a reasonably limited period without requiring the Government to meet its *Addington* burden. See *United States* v. *Brown*, 155 U. S. App. D. C. 402, 408, 478 F. 2d 606, 612 (1973); American Psychiatric Assn., Statement on the Insanity Defense 15 (1982); cf. *Jackson* v. *Indiana*, 406 U. S., at 738; *McNeil* v. *Director, Patuxent Institution*, 407 U. S. 245, 249 (1972). In this case, petitioner submits that such a reasonable period extends no longer than the maximum sentence that could have been imposed had he been found guilty of the crime charged. But at some point the Government must be required to justify further commitment under the standards of *Addington*.[17]

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[17] The Court asserts that the Government has a "strong interest" in avoiding a *de novo* commitment hearing after an insanity acquittal. *Ante*, at 366. There appear to be several reasons for this. First, the Court mentions that a jury would be available at such a hearing. Petitioner, however, has not argued that the Due Process Clause requires that a jury be provided when an insanity acquittee is committed. If a jury were required in this case, it would only be because, lacking a constitutional basis to keep petitioner under confinement beyond the period he has already

4. If the Government's interests were the only ones at stake, an insanity acquittal would furnish a reasonable basis for indefinite commitment. Under the Constitution, however, the Government's interests must be considered in light of the liberty interests of the individual who is subject to commitment. In the final analysis, the Court disregards *Addington* not on the ground that the Government's interests in committing insanity acquittees are different from or stronger than its interests in committing criminals who happen to be mentally ill, or mentally ill individuals who have done violent, dangerous things, but on the theory that "there is good reason for diminished concern as to the risk of error" when a person is committed indefinitely on the basis of an insanity acquittal. See *ante*, at 367.

The "risk of error" that, according to the Court, is diminished in this context subsumes two separate risks. First, the Court notes that in *Addington* we were concerned, at least in part, that individuals might be committed for mere idiosyncratic behavior, see 441 U. S., at 427, and it observes that criminal acts are outside the "'range of conduct that is generally acceptable.'" *Ante*, at 367, quoting 441 U. S., at 426–427. *O'Connor*, however, requires that a person be proved *dangerous*, not merely "unacceptable," before he may

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spent in jail or in St. Elizabeths, the Government had to turn to the existing civil commitment process to justify further commitment. Second, the Court apparently believes that the Government's "strong interest" extends to avoiding the "clear and convincing evidence" standard. While it might often be convenient for the Government to accord individuals fewer protections than the Due Process Clause requires, constitutional standards of due process reflect individual interests as well as governmental efficiency. See *infra*, this page and 384–386. Finally, the Court states that "the new proceeding likely would have to relitigate much of the criminal trial." *Ante*, at 366. In this case, of course, there was no criminal trial, because the Government accepted petitioner's "not guilty by reason of insanity" plea, but in any event the issues of present mental illness and dangerousness are sufficiently different from the issues raised by an insanity defense so that even if the latter were taken as settled there would still be a need for findings of fact on new issues. See *supra*, at 377–380.

be subjected to the massive curtailment of individual freedom and autonomy that indefinite commitment entails. In *Addington* itself, the State had clearly proved by a preponderance of the evidence that the petitioner had engaged repeatedly in conduct far beyond the pale of acceptable behavior, yet we did not regard that level of proof as furnishing adequate protection for the individual interests at stake.[18]

Second, the Court reasons that "[a] criminal defendant who successfully raises the insanity defense necessarily is stigmatized by the verdict itself," and therefore that committing him does not involve the same risk of stigmatization a civil commitment may entail. *Ante*, at 367, n. 16. This is perhaps the Court's most cynical argument. It is true that in *Addington* and in *Vitek* v. *Jones*, 445 U. S. 480 (1980), we recognized that individuals have an interest in not being stigmatized by society at large on account of being labeled mentally ill. 441 U. S., at 426; 445 U. S., at 492. Avoiding stigma, however, is only one of the reasons for recognizing a liberty interest in avoiding involuntary commitment. We have repeatedly acknowledged that persons who have already been labeled as mentally ill nonetheless retain an interest in avoiding involuntary commitment. See, *e. g.*, *O'Connor* v. *Donaldson*, 422 U. S., at 575; *Baxstrom* v. *Herold*, 383 U. S. 107 (1966). Other aspects of involuntary commitment affect them in far more immediate ways.

In many respects, confinement in a mental institution is even more intrusive than incarceration in a prison. Inmates of mental institutions, like prisoners, are deprived of unrestricted association with friends, family, and community;

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[18] The jury in *Addington* had been instructed that they must find Addington mentally ill and in need of hospitalization for his own welfare and protection or for the protection of others based upon "clear, unequivocal and convincing evidence." 441 U. S., at 421. As explained above, see n. 2, *supra*, we held that proof by a preponderance of the evidence would not have been sufficient, and we remanded for a determination by the state courts whether the jury instruction given corresponded to the constitutionally required "clear and convincing evidence" standard. 441 U. S., at 433.

they must contend with locks, guards, and detailed regulation of their daily activities. In addition, a person who has been hospitalized involuntarily may to a significant extent lose the right enjoyed by others to withhold consent to medical treatment. See *Youngberg* v. *Romeo*, 457 U. S. 307, 321 (1982) (involuntary committee's due process right to freedom from unreasonable restraint limited to a guarantee that professional medical judgment be exercised). The treatments to which he may be subjected include physical restraints such as straightjacketing, as well as electroshock therapy, aversive conditioning, and even in some cases psychosurgery. Administration of psychotropic medication to control behavior is common. See American Psychiatric Assn., Statement on the Insanity Defense 15 (1982) ("Greater emphasis is now placed upon psychopharmacological management of the hospitalized person"). Although this Court has never approved the practice, it is possible that an inmate will be given medication for reasons that have more to do with the needs of the institution than with individualized therapy.[19] See *Mills* v. *Rogers*, 457 U. S. 291, 303 (1982); *Rennie* v. *Klein*, 653 F. 2d 836, 845 (CA3 1981) (en banc). We should not presume that he lacks a compelling interest in having the decisions to commit him and to keep him institutionalized made carefully, and in a manner that preserves the maximum degree of personal autonomy.

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[19] The record in this case provides a chilling example: Several months after petitioner's arrest, a psychologist at St. Elizabeths submitted a report on his mental condition to the court. The report disclosed that petitioner was being given 400 milligrams of Thorazine (a psychotropic drug) daily, and that, in the opinion of the staff, petitioner was competent to stand trial. See Record 48–51. Approximately three months later, at petitioner's May 1976 hearing, Dr. Gertrude Cooper, another staff psychologist at St. Elizabeths, testified that petitioner was being given 900 milligrams of Thorazine a day at that time. Tr. 8. (Shortly before the hearing, however, she had submitted a report which indicated that petitioner was receiving 1,000 milligrams of Thorazine daily, plus a tranquilizer. Record 54.) In her own words, "this is sort of a heavy dose of medication." Tr. 9. None of Dr. Cooper's testimony indicates why petitioner's daily medication was more than doubled after he no longer needed to be competent to stand trial; any specific worsening of his condition would certainly have been relevant at the May hearing.

Therefore, I cannot agree with the Court that petitioner in this case has any less interest in procedural protections during the commitment process than the petitioners in *Addington*, *O'Connor*, or *Baxstrom*, and I cannot agree that the risks of error which an indefinite commitment following an insanity acquittal entails are sufficiently diminished to justify relieving the Government of the responsibilities defined in *Addington*.

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Indefinite commitment without the due process protections adopted in *Addington* and *O'Connor* is not reasonably related to any of the Government's purported interests in confining insanity acquittees for psychiatric treatment. The rationales on which the Court justifies § 24–301's departures from *Addington* at most support deferring *Addington*'s due process protections—specifically its requirement that the Government carry the burden of proof by clear and convincing evidence—for a limited period only, not indefinitely.

The maximum sentence for attempted petit larceny in the District of Columbia is one year. Beyond that period, petitioner should not have been kept in involuntary confinement unless he had been committed under the standards of *Addington* and *O'Connor*. Petitioner had been in custody for 17 months at the time of his February 1977 hearing, either in St. Elizabeths or in the District of Columbia Correctional Center. At that time he should have received the benefit of the *Addington* due process standards, and, because he did not, the findings at that hearing cannot provide constitutionally adequate support for his present commitment. I would therefore reverse the judgment of the District of Columbia Court of Appeals.

JUSTICE STEVENS, dissenting.

The character of the conduct that causes a person to be incarcerated in an institution is relevant to the length of his permissible detention. In my opinion, a plea of not guilty by reason of insanity, like a plea of guilty, may provide a sufficient basis for confinement for the period fixed by the legislature as punishment for the acknowledged conduct, provided of course that the acquittee is given a fair opportunity to prove that he has recovered from his illness. But surely if he is to be confined for a longer period, the State must shoulder the burden of proving by clear and convincing evidence that such additional confinement is appropriate. As JUSTICE BRENNAN demonstrates, that result is dictated by our prior cases. What JUSTICE POWELL has written lends support to the view that the *initial* confinement of the acquittee is permissible, but provides no support for the conclusion that he has the burden of proving his entitlement to freedom after he has served the maximum sentence authorized by law. I respectfully dissent because I believe this shoplifter was presumptively entitled to his freedom after he had been incarcerated for a period of one year.

MUELLER ET AL. *v.* ALLEN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82-195. Argued April 18, 1983—Decided June 29, 1983

A Minnesota statute (§ 290.09, subd. 22) allows state taxpayers, in computing their state income tax, to deduct expenses incurred in providing "tuition, textbooks and transportation" for their children attending an elementary or secondary school. Petitioner Minnesota taxpayers brought suit in Federal District Court against respondent Minnesota Commissioner of Revenue and respondent parents who had taken the tax deduction for expenses incurred in sending their children to parochial schools, claiming that § 290.09, subd. 22, violates the Establishment Clause of the First Amendment by providing financial assistance to sectarian institutions. The District Court granted summary judgment for respondents, holding that the statute is neutral on its face and in its application and does not have a primary effect of either advancing or inhibiting religion. The Court of Appeals affirmed.

Held: Section 290.09, subd. 22, does not violate the Establishment Clause, but satisfies all elements of the "three-part" test laid down in *Lemon* v. *Kurtzman*, 403 U. S. 602, that must be met for such a statute to be upheld under the Clause. Pp. 392-403.

(a) The tax deduction in question has the secular purpose of ensuring that the State's citizenry is well educated, as well as of assuring the continued financial health of private schools, both sectarian and nonsectarian. Pp. 394-395.

(b) The deduction does not have the primary effect of advancing the sectarian aims of nonpublic schools. It is only one of many deductions—such as those for medical expenses and charitable contributions—available under the Minnesota tax laws; is available for educational expenses incurred by *all* parents, whether their children attend public schools or private sectarian or nonsectarian private schools, *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, distinguished; and provides aid to parochial schools only as a result of decisions of individual parents rather than directly from the State to the schools themselves. The Establishment Clause's historic purposes do not encompass the sort of attenuated financial benefit that eventually flows to parochial schools from the neutrally available tax benefit at issue. The fact that notwithstanding § 290.09, subd. 22's facial neutrality, a particular annual statistical analysis shows that the statute's application primarily benefits religious institutions, does not provide the certainty needed to determine the statute's constitutionality. Moreover, private schools, and parents paying for their children to attend these schools, make special contributions to the areas in which the schools operate. Pp. 396–402.

(c) Section 290.09, subd. 22, does not "excessively entangle" the State in religion. The fact that state officials must determine whether particular textbooks qualify for the tax deduction and must disallow deductions for textbooks used in teaching religious doctrines is an insufficient basis for finding such entanglement. P. 403.

676 F. 2d 1195, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 404.

William I. Kampf argued the cause for petitioners. With him on the brief were *James A. Lee, Jr.*, *Charles S. Sims*, and *Burt Neuborne*.

Douglas C. Blomgren, Special Assistant Attorney General of Minnesota, argued the cause for respondents. With him on the brief for respondent Allen were *Hubert H. Humphrey III*, Attorney General, *Catharine F. Haukedahl*, Special Assistant Attorney General, and *William P. Marshall*. *John R. Kenefick* filed a brief for respondents Becker et al. *Timothy P. Quinn* and *Andrew J. Eisenzimmer* filed a brief for respondents Berthiaume et al.*

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*Briefs of *amici curiae* urging reversal were filed by *Lee Boothby* and *Robert W. Nixon* for Americans United for Separation of Church and State; by *John W. Baker* for the Baptist Joint Committee on Public Affairs; and by *Russell C. Brown* for the Minnesota Association of School Administrators et al.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General Lee*, *Assistant Attorney General McGrath*, *Deputy Assistant Attorney General Kuhl*, *John H. Garvey*, *Robert E. Kopp*, and *Michael F. Hertz* for the United States; by *Edward McGlynn Gaffney, Jr.*, for the Council for American Private Education et al.; by *Nathan Lewin*, *Daniel D. Chazin*, and *Dennis Rapps* for the National Jewish Commission on Law and Public Affairs; by *David J. Young* for Citizens for Educational Freedom; and by

JUSTICE REHNQUIST delivered the opinion of the Court.

Minnesota allows taxpayers, in computing their state income tax, to deduct certain expenses incurred in providing for the education of their children. Minn. Stat. § 290.09, subd. 22 (1982).[1] The United States Court of Appeals for the Eighth Circuit held that the Establishment Clause of the First Amendment, as made applicable to the States by the Fourteenth Amendment, was not offended by this arrangement. Because this question was reserved in *Committee for Public Education* v. *Nyquist*, 413 U. S. 756 (1973), and be-

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Wilfred R. Caron, *Edward Bennett Williams*, and *John A. Liekweg* for the United States Catholic Conference.

Briefs of *amici curiae* were filed by *Charles E. Rice* for the Catholic League for Religious and Civil Rights; by *Henry C. Clausen* for United Americans for Public Schools; by *John J. Donnelly* for Parents Rights, Inc.; by *Gwendolyn H. Gregory*, *August W. Steinhilber*, and *Thomas A. Shannon* for the National School Boards Association; by *William H. Mellor III* and *Maxwell A. Miller* for the Mountain Legal States Foundation et al.; and by *Robert Chanin*, *Laurence Gold*, *Nathan Z. Dershowitz*, and *Marc D. Stern* for the National Committee for Public Education and Religious Liberty et al.

[1] Minnesota Stat. § 290.09, subd. 22 (1982), permits a taxpayer to deduct from his or her computation of gross income the following:

"Tuition and transportation expense. The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964 and chapter 363. As used in this subdivision, 'textbooks' shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature."

cause of a conflict between the decision of the Court of Appeals for the Eighth Circuit and that of the Court of Appeals for the First Circuit in *Rhode Island Federation of Teachers* v. *Norberg*, 630 F. 2d 855 (CA1 1980), we granted certiorari. 459 U. S. 820 (1982). We now affirm.

Minnesota, like every other State, provides its citizens with free elementary and secondary schooling. Minn. Stat. §§120.06, 120.72 (1982). It seems to be agreed that about 820,000 students attended this school system in the most recent school year. During the same year, approximately 91,000 elementary and secondary students attended some 500 privately supported schools located in Minnesota, and about 95% of these students attended schools considering themselves to be sectarian.

Minnesota, by a law originally enacted in 1955 and revised in 1976 and again in 1978, permits state taxpayers to claim a deduction from gross income for certain expenses incurred in educating their children. The deduction is limited to actual expenses incurred for the "tuition, textbooks and transportation" of dependents attending elementary or secondary schools. A deduction may not exceed $500 per dependent in grades K through 6 and $700 per dependent in grades 7 through 12. Minn. Stat. §290.09, subd. 22 (1982).[2]

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[2] Both lower courts found that the statute permits deduction of a range of educational expenses. The District Court found that deductible expenses included:

"1. Tuition in the ordinary sense.

"2. Tuition to public school students who attend public schools outside their residence school districts.

"3. Certain summer school tuition.

"4. Tuition charged by a school for slow learner private tutoring services.

"5. Tuition for instruction provided by an elementary or secondary school to students who are physically unable to attend classes at such school.

"6. Tuition charged by a private tutor or by a school that is not an elementary or secondary school if the instruction is acceptable for credit in an elementary or secondary school.

"7. Montessori School tuition for grades K through 12.

[Footnote 2 is continued on p. 392]

Petitioners—certain Minnesota taxpayers—sued in the United States District Court for the District of Minnesota claiming that § 290.09, subd. 22, violated the Establishment Clause by providing financial assistance to sectarian institutions. They named as defendants, respondents here, the Commissioner of the Department of Revenue of Minnesota and several parents who took advantage of the tax deduction for expenses incurred in sending their children to parochial schools. The District Court granted respondents' motion for summary judgment, holding that the statute was "neutral on its face and in its application and does not have a primary effect of either advancing or inhibiting religion." 514 F. Supp. 998, 1003 (1981). On appeal, the Court of Appeals affirmed, concluding that the Minnesota statute substantially benefited a "broad class of Minnesota citizens." 676 F. 2d 1195, 1205 (1982).

Today's case is no exception to our oft-repeated statement that the Establishment Clause presents especially difficult questions of interpretation and application. It is easy enough to quote the few words constituting that Clause—"Congress shall make no law respecting an establishment of

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"8. Tuition for driver education when it is part of the school curriculum." 514 F. Supp. 998, 1000 (1981).

The Court of Appeals concurred in this finding.

In addition, the District Court found that the statutory deduction for "textbooks" included not only "secular textbooks" but also:

"1. Cost of tennis shoes and sweatsuits for physical education.
"2. Camera rental fees paid to the school for photography classes.
"3. Ice skates rental fee paid to the school.
"4. Rental fee paid to the school for calculators for mathematics classes.
"5. Costs of home economics materials needed to meet minimum requirements.
"6. Costs of special metal or wood needed to meet minimum requirements of shop classes.
"7. Costs of supplies needed to meet minimum requirements of art classes.
"8. Rental fees paid to the school for musical instruments.
"9. Cost of pencils and special notebooks required for class." *Ibid.*

The Court of Appeals accepted this finding.

religion." It is not at all easy, however, to apply this Court's various decisions construing the Clause to governmental programs of financial assistance to sectarian schools and the parents of children attending those schools. Indeed, in many of these decisions we have expressly or implicitly acknowledged that "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Lemon* v. *Kurtzman*, 403 U. S. 602, 612 (1971), quoted in part with approval in *Nyquist*, 413 U. S., at 761, n. 5.

One fixed principle in this field is our consistent rejection of the argument that "any program which in some manner aids an institution with a religious affiliation" violates the Establishment Clause. *Hunt* v. *McNair*, 413 U. S. 734, 742 (1973). See, *e. g.*, *Bradfield* v. *Roberts*, 175 U. S. 291 (1899); *Walz* v. *Tax Comm'n*, 397 U. S. 664 (1970). For example, it is now well established that a State may reimburse parents for expenses incurred in transporting their children to school, *Everson* v. *Board of Education*, 330 U. S. 1 (1947), and that it may loan secular textbooks to all schoolchildren within the State, *Board of Education* v. *Allen*, 392 U. S. 236 (1968).

Notwithstanding the repeated approval given programs such as those in *Allen* and *Everson*, our decisions also have struck down arrangements resembling, in many respects, these forms of assistance. See, *e. g.*, *Lemon* v. *Kurtzman*, *supra; Levitt* v. *Committee for Public Education*, 413 U. S. 472 (1973); *Meek* v. *Pittenger*, 421 U. S. 349 (1975); *Wolman* v. *Walter*, 433 U. S. 229, 237–238 (1977).[3] In this case we are asked to decide whether Minnesota's tax deduction bears greater resemblance to those types of assistance to parochial schools we have approved, or to those we have struck down. Petitioners place particular reliance on our decision in *Committee for Public Education* v. *Nyquist, supra,* where we held invalid a New York statute providing public funds for the maintenance and repair of the physical facilities of private schools and granting thinly disguised "tax benefits," actually amounting to tuition grants, to the parents of children attending private schools. As explained below, we conclude that § 290.09, subd. 22, bears less resemblance to the arrangement struck down in *Nyquist* than it does to assistance programs upheld in our prior decisions and those discussed with approval in *Nyquist.*

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[3] In *Lemon* v. *Kurtzman*, the Court concluded that the State's reimbursement of nonpublic schools for the cost of teachers' salaries, textbooks, and instructional materials, and its payment of a salary supplement to teachers in nonpublic schools, resulted in excessive entanglement of church and state. In *Levitt* v. *Committee for Public Education*, we struck down on Establishment Clause grounds a state program reimbursing nonpublic schools for the cost of teacher-prepared examinations. Finally, in *Meek* v. *Pittenger* and *Wolman* v. *Walter*, we held unconstitutional a direct loan of instructional materials to nonpublic schools, while upholding the loan of textbooks to individual students.

The general nature of our inquiry in this area has been guided, since the decision in *Lemon* v. *Kurtzman, supra,* by the "three-part" test laid down in that case:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.,* at 612–613.

While this principle is well settled, our cases have also emphasized that it provides "no more than [a] helpful signpos[t]" in dealing with Establishment Clause challenges. *Hunt* v. *McNair, supra,* at 741. With this caveat in mind, we turn to the specific challenges raised against § 290.09, subd. 22, under the *Lemon* framework.

Little time need be spent on the question of whether the Minnesota tax deduction has a secular purpose. Under our prior decisions, governmental assistance programs have consistently survived this inquiry even when they have run afoul of other aspects of the *Lemon* framework. See, *e. g., Lemon* v. *Kurtzman, supra; Meek* v. *Pittenger, supra,* at 363; *Wolman* v. *Walter, supra,* at 236. This reflects, at least in part, our reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute.

A State's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a State's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State's citizenry is well educated. Similarly, Minnesota, like other States, could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and nonsectarian. By educating a substantial number of students such schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers. In addition, private schools may serve as a benchmark for public schools, in a manner analogous to the "TVA yardstick" for private power companies. As JUSTICE POWELL has remarked:

> "Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them." *Wolman* v. *Walter*, *supra*, at 262 (concurring in part, concurring in judgment in part, and dissenting in part).

All these justifications are readily available to support § 290.09, subd. 22, and each is sufficient to satisfy the secular purpose inquiry of *Lemon*.[4]

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[4] Section 290.09 contains no express statements of legislative purpose, and its legislative history offers few unambiguous indications of actual in-

We turn therefore to the more difficult but related question whether the Minnesota statute has "the primary effect of advancing the sectarian aims of the nonpublic schools." *Committee for Public Education* v. *Regan*, 444 U. S. 646, 662 (1980); *Lemon* v. *Kurtzman*, 403 U. S., at 612–613. In concluding that it does not, we find several features of the Minnesota tax deduction particularly significant. First, an essential feature of Minnesota's arrangement is the fact that § 290.09, subd. 22, is only one among many deductions—such as those for medical expenses, § 290.09, subd. 10, and charitable contributions, § 290.21, subd. 3—available under the Minnesota tax laws.[5] Our decisions consistently have recognized that traditionally "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes," *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 547 (1983), in part because the "familiarity with local conditions" enjoyed by legislators especially enables them to "achieve an equitable distribution of the tax burden." *Madden* v. *Kentucky*, 309 U. S. 83, 88 (1940). Under our prior decisions, the Minnesota Legislature's judgment that a deduction for educational expenses fairly equalizes the tax burden of its citizens and encourages desirable expenditures for educational purposes is entitled to substantial deference.[6]

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tent. The absence of such evidence does not affect our treatment of the statute.

[5] Deductions for charitable contributions, allowed by Minnesota law, Minn. Stat. § 290.21, subd. 3 (1982), include contributions to religious institutions, and exemptions from property tax for property used for charitable purposes under Minnesota law include property used for wholly religious purposes, § 272.02. In each case, it may be that religious institutions benefit very substantially from the allowance of such deductions. The Court's holding in *Walz* v. *Tax Comm'n*, 397 U. S. 664 (1970), indicates, however, that this does not require the conclusion that such provisions of a State's tax law violate the Establishment Clause.

[6] Our decision in *Committee for Public Education* v. *Nyquist*, 413 U. S. 756 (1973), is not to the contrary on this point. We expressed considerable doubt there that the "tax benefits" provided by New York law properly could be regarded as parts of a genuine system of tax laws. Plainly, the

Other characteristics of § 290.09, subd. 22, argue equally strongly for the provision's constitutionality. Most importantly, the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools. Just as in *Widmar* v. *Vincent*, 454 U. S. 263, 274 (1981), where we concluded that the State's provision of a forum neutrally "available to a broad class of nonreligious as well as religious speakers" does not "confer any imprimatur of state approval," *ibid.*, so here: "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect."[7] *Ibid.*

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outright grants to low-income parents did not take the form of ordinary tax benefits. As to the benefits provided to middle-income parents, the Court said:

"The amount of the deduction is unrelated to the amount of money actually expended by any parent on tuition, but is calculated on the basis of a formula contained in the statute. The formula is apparently the product of a legislative attempt to assure that each family would receive a carefully estimated net benefit, and that the tax benefit would be comparable to, and compatible with, the tuition grant for lower income families." *Id.*, at 790 (footnote omitted).

Indeed, the question whether a program having the elements of a "genuine tax deduction" would be constitutionally acceptable was expressly reserved in *Nyquist*, *supra*, at 790, n. 49. While the economic consequences of the program in *Nyquist* and that in this case may be difficult to distinguish, we have recognized on other occasions that "the form of the [State's assistance to parochial schools must be examined] for the light that it casts on the substance." *Lemon* v. *Kurtzman*, 403 U. S., at 614. The fact that the Minnesota plan embodies a "genuine tax deduction" is thus of some relevance, especially given the traditional rule of deference accorded legislative classifications in tax statutes.

[7] Likewise, in *Sloan* v. *Lemon*, 413 U. S. 825, 832 (1973), where we held that a Pennsylvania statute violated the First Amendment, we emphasized that "the State [had] singled out a class of its citizens for a special economic benefit." We also observed in *Widmar* that "empirical evidence that religious groups will dominate [the school's] open forum," 454 U. S., at 275, might be relevant to analysis under the Establishment Clause. We address this *infra*, at 400–402.

In this respect, as well as others, this case is vitally different from the scheme struck down in *Nyquist*. There, public assistance amounting to tuition grants was provided only to parents of children in *nonpublic* schools. This fact had considerable bearing on our decision striking down the New York statute at issue; we explicitly distinguished both *Allen* and *Everson* on the grounds that "[i]n both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools." 413 U. S., at 782–783, n. 38 (emphasis in original).[8] Moreover, we intimated that "public assistance (*e. g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited," *ibid.*, might not offend the Establishment Clause. We think the tax deduction adopted by Minnesota is more similar to this latter type of program than it is to the arrangement struck down in *Nyquist*. Unlike the assistance at issue in *Nyquist*, § 290.09, subd. 22, permits *all* parents—whether their children attend public school or private—to deduct their children's educational expenses. As *Widmar* and our other decisions indicate, a program, like § 290.09, subd. 22, that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.

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[8] Our full statement was:

"*Allen* and *Everson* differ from the present litigation in a second important respect. In both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools. See also *Tilton* v. *Richardson*, [403 U. S. 672 (1971)], in which federal aid was made available to *all* institutions of higher learning, and *Walz* v. *Tax Comm'n*, *supra*, in which tax exemptions were accorded to *all* educational and charitable nonprofit institutions. . . . Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (*e. g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. . . . Thus, our decision today does not compel . . . the conclusion that the educational assistance provisions of the 'G. I. Bill,' 38 U. S. C. § 1651, impermissibly advance religion in violation of the Establishment Clause." 413 U. S., at 782–783, n. 38. See also, *id.*, at 775.

We also agree with the Court of Appeals that, by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject. It is true, of course, that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children. It is also true, however, that under Minnesota's arrangement public funds become available only as a result of numerous private choices of individual parents of school-age children. For these reasons, we recognized in *Nyquist* that the means by which state assistance flows to private schools is of some importance: we said that "the fact that aid is disbursed to parents rather than to . . . schools" is a material consideration in Establishment Clause analysis, albeit "only one among many factors to be considered." 413 U. S., at 781. It is noteworthy that all but one of our recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the State to the schools themselves. The exception, of course, was *Nyquist*, which, as discussed previously, is distinguishable from this case on other grounds. Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no "imprimatur of state approval," *Widmar, supra*, at 274, can be deemed to have been conferred on any particular religion, or on religion generally.

We find it useful, in the light of the foregoing characteristics of § 290.09, subd. 22, to compare the attenuated financial benefits flowing to parochial schools from the section to the evils against which the Establishment Clause was designed to protect. These dangers are well described by our statement that "'[w]hat is at stake as a matter of policy [in Establishment Clause cases] is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.'" *Nyquist*, 413 U. S., at 796, quoting *Walz* v. *Tax Comm'n*, 397 U. S., at 694 (opinion of Harlan, J.). It is important, however, to "keep these issues in perspective":

> "At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. See *Walz* v. *Tax Comm'n*, 397 U. S. 664, 668 (1970). The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court." *Wolman*, 433 U. S., at 263 (POWELL, J., concurring in part, concurring in judgment in part, and dissenting in part).

The Establishment Clause of course extends beyond prohibition of a state church or payment of state funds to one or more churches. We do not think, however, that its prohibition extends to the type of tax deduction established by Minnesota. The historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.

Petitioners argue that, notwithstanding the facial neutrality of § 290.09, subd. 22, in application the statute primarily benefits religious institutions.[9] Petitioners rely, as they did below, on a statistical analysis of the type of persons claiming the tax deduction. They contend that most parents of public school children incur no tuition expenses, see Minn. Stat. § 120.06 (1982), and that other expenses deductible under § 290.09, subd. 22, are negligible in value; moreover, they claim that 96% of the children in private schools in 1978–1979 attended religiously affiliated institutions. Because of all this, they reason, the bulk of deductions taken under § 290.09, subd. 22, will be claimed by parents of children in sectarian schools. Respondents reply that petitioners have failed to consider the impact of deductions for items such as transportation, summer school tuition, tuition paid by parents whose children attended schools outside the school districts in which they resided, rental or purchase costs for a variety of equipment, and tuition for certain types of instruction not ordinarily provided in public schools.

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[9] Petitioners cite a "Revenue Analysis" prepared in 1976 by the Minnesota Department of Revenue, which states that "[o]nly those taxpayers having dependents in nonpublic elementary or secondary schools are affected by this law since tuition, transportation and textbook expenses for public school students are paid for by the school district." Brief for Petitioners 38. We fail to see the significance of the report; it is no more than a capsule description of the tax deduction provision. As discussed below, and as the lower courts expressly found, the analysis is plainly mistaken, as

We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled—under a facially neutral statute—should be of little importance in determining the constitutionality of the statute permitting such relief.

Finally, private educational institutions, and parents paying for their children to attend these schools, make special contributions to the areas in which they operate. "Parochial

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a factual matter, regarding the effect of § 290.09, subd. 22. Moreover, several memoranda prepared by the Minnesota Department of Revenue in 1979—stating that a number of specific expenses may be deducted by parents with children in public school—clearly indicate that the summary discussion in the 1976 memorandum was not intended as any comprehensive or binding agency determination.

schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools." *Wolman, supra,* at 262 (POWELL, J., concurring in part, concurring in judgment in part, and dissenting in part). If parents of children in private schools choose to take especial advantage of the relief provided by § 290.09, subd. 22, it is no doubt due to the fact that they bear a particularly great financial burden in educating their children. More fundamentally, whatever unequal effect may be attributed to the statutory classification can fairly be regarded as a rough return for the benefits, discussed above, provided to the State and all taxpayers by parents sending their children to parochial schools. In the light of all this, we believe it wiser to decline to engage in the type of empirical inquiry into those persons benefited by state law which petitioners urge.[10]

Thus, we hold that the Minnesota tax deduction for educational expenses satisfies the primary effect inquiry of our Establishment Clause cases.

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[10] Our conclusion is unaffected by the fact that § 290.09, subd. 22, permits deductions for amounts spent for textbooks and transportation as well as tuition. In *Everson* v. *Board of Education,* 330 U. S. 1 (1947), we approved a statute reimbursing parents of *all* schoolchildren for the costs of transporting their children to school. Doing so by means of a deduction, rather than a direct grant, only serves to make the State's action less objectionable. Likewise, in *Board of Education* v. *Allen,* 392 U. S. 236 (1968), we approved state loans of textbooks to *all* schoolchildren; although we disapproved, in *Meek* v. *Pittenger,* 421 U. S. 349 (1975), and *Wolman* v. *Walter,* 433 U. S. 229 (1977), direct loans of instructional materials to sectarian schools, we do not find those cases controlling. First, they involved assistance provided to the schools themselves, rather than tax benefits directed to individual parents, see *supra,* at 399. Moreover, we think that state assistance for the rental of calculators, see App. A18, ice skates, *ibid.,* tennis shoes, *ibid.,* and the like, scarcely poses the type of dangers against which the Establishment Clause was intended to guard.

Turning to the third part of the *Lemon* inquiry, we have no difficulty in concluding that the Minnesota statute does not "excessively entangle" the State in religion. The only plausible source of the "comprehensive, discriminating, and continuing state surveillance," 403 U. S., at 619, necessary to run afoul of this standard would lie in the fact that state officials must determine whether particular textbooks qualify for a deduction. In making this decision, state officials must disallow deductions taken for "instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship." Minn. Stat. § 290.09, subd. 22 (1982). Making decisions such as this does not differ substantially from making the types of decisions approved in earlier opinions of this Court. In *Board of Education* v. *Allen*, 392 U. S. 236 (1968), for example, the Court upheld the loan of secular textbooks to parents or children attending nonpublic schools; though state officials were required to determine whether particular books were or were not secular, the system was held not to violate the Establishment Clause. See also *Wolman* v. *Walter*, 433 U. S. 229 (1977); *Meek* v. *Pittenger*, 421 U. S. 349 (1975). The same result follows in this case.[11]

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[11] No party to this litigation has urged that the Minnesota plan is invalid because it runs afoul of the rather elusive inquiry, subsumed under the third part of the *Lemon* test, whether the Minnesota statute partakes of the "divisive political potential" condemned in *Lemon*, 403 U. S., at 622. The argument is advanced, however, by *amici* National Committee for Public Education and Religious Liberty et al. This variation of the "entanglement" test has been interpreted differently in different cases. Compare *Lemon* v. *Kurtzman*, 403 U. S., at 622–625, with *id.*, at 665–666 (opinion of WHITE, J.); *Meek* v. *Pittenger*, 421 U. S., at 359–362, with *id.*, at 374–379 (BRENNAN, J., concurring in part and dissenting in part). Since this aspect of the "entanglement" inquiry originated with *Lemon* v. *Kurtzman*, *supra*, and the Court's opinion there took pains to distinguish both *Everson* v. *Board of Education*, *supra*, and *Board of Education* v. *Allen*, *supra*, the Court in *Lemon* must have been referring to a phenome-

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

The Establishment Clause of the First Amendment prohibits a State from subsidizing religious education, whether it does so directly or indirectly. In my view, this principle of neutrality forbids not only the tax benefits struck down in *Committee for Public Education* v. *Nyquist*, 413 U. S. 756 (1973), but any tax benefit, including the tax deduction at issue here, which subsidizes tuition payments to sectarian schools. I also believe that the Establishment Clause prohibits the tax deductions that Minnesota authorizes for the cost of books and other instructional materials used for sectarian purposes.

I

The majority today does not question the continuing vitality of this Court's decision in *Nyquist*. That decision established that a State may not support religious education either through direct grants to parochial schools or through financial aid to parents of parochial school students. *Id.*, at 780, 785–786. *Nyquist* also established that financial aid to parents of students attending parochial schools is no more permissible if it is provided in the form of a tax credit than if provided in the form of cash payments. *Id.*, at 789–791; see *ante*, at 396–397, n. 6. Notwithstanding these accepted prin-

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non which, although present in that case, would have been absent in the two cases it distinguished.

The Court's language in *Lemon* respecting political divisiveness was made in the context of Pennsylvania and Rhode Island statutes which provided for either direct payments of, or reimbursement of, a proportion of teachers' salaries in parochial schools. We think, in the light of the treatment of the point in later cases discussed above, the language must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools.

ciples, the Court today upholds a statute that provides a tax deduction for the tuition charged by religious schools. The Court concludes that the Minnesota statute is "vitally different" from the New York statute at issue in *Nyquist*. *Ante*, at 398. As demonstrated below, there is no significant difference between the two schemes. The Minnesota tax statute violates the Establishment Clause for precisely the same reason as the statute struck down in *Nyquist:* it has a direct and immediate effect of advancing religion.

A

In calculating their net income for state income tax purposes, Minnesota residents are permitted to deduct the cost of their children's tuition, subject to a ceiling of $500 or $700 per child. By taking this deduction, a taxpayer reduces his tax bill by a sum equal to the amount of tuition multiplied by his rate of tax. Although this tax benefit is available to any parents whose children attend schools which charge tuition, the vast majority of the taxpayers who are eligible to receive the benefit are parents whose children attend religious schools. In the 1978–1979 school year, 90,000 students were enrolled in nonpublic schools charging tuition; over 95% of those students attended sectarian schools. Although the statute also allows a deduction for the tuition expenses of children attending public schools, Minnesota public schools are generally prohibited by law from charging tuition. Minn. Stat. § 120.06 (1982). Public schools may assess tuition charges only for students accepted from outside the district. § 123.39, subd. 5. In the 1978–1979 school year, only 79 public school students fell into this category. The parents of the remaining 815,000 students who attended public schools were ineligible to receive this tax benefit.

Like the law involved in *Nyquist*, the Minnesota law can be said to serve a secular purpose: promoting pluralism and diversity among the State's public and nonpublic schools. But the Establishment Clause requires more than that legislation have a secular purpose. *Nyquist*, 413 U. S., at 773. "[T]he propriety of a legislature's purposes may not immunize from further scrutiny a law which . . . has a primary effect that advances religion." *Id.*, at 774.[1] Moreover, even if one "'primary' effect [is] to promote some legitimate end under the State's police power," the legislation is not "immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion." *Id.*, at 783–784, n. 39. See, *e. g.*, *Wolman* v. *Walter*, 433 U. S. 229, 248–254 (1977); *Meek* v. *Pittenger*, 421 U. S. 349, 364–366 (1975).

As we recognized in *Nyquist*, direct government subsidization of parochial school tuition is impermissible because "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." 413 U. S., at 783. "[A]id to the educational function of [parochial] schools . . . necessarily results in aid to the sectarian school enterprise as a whole" because "[t]he very purpose of many of those schools is to provide an integrated secular and religious education." *Meek* v. *Pittenger*, *supra*, at 366. For this reason, aid to sectarian schools must be restricted to ensure that it may be not used to further the religious mission of those schools. See, *e. g.*, *Wolman* v. *Walter*, *supra*, at 250–251. While "services such as police and fire protection, sewage disposal, highways, and sidewalks," may be provided to parochial schools in common with other institutions, because this type of assistance is clearly "'marked off from the religious function'" of those schools, *Nyquist*, *supra*, at 781–782, quoting *Everson* v. *Board of Education*, 330 U. S. 1, 18 (1947), unrestricted financial assistance, such as grants for the maintenance and construction of parochial schools, may not be provided. *Nyquist*, 413 U. S., at 774–780. "In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." *Id.*, at 780.

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[1] As we noted in *Nyquist*, it is "firmly established" that a statute may impermissibly advance religion "even though it does not aid one religion more than another but merely benefits all religions alike." 413 U. S., at 771. See, *e. g.*, *Wolman* v. *Walter*, 433 U. S. 229, 248–254 (1977); *Meek* v. *Pittenger*, 421 U. S. 349, 364–366 (1975).

Indirect assistance in the form of financial aid to parents for tuition payments is similarly impermissible because it is not "subject to . . . restrictions" which "'guarantee the separation between secular and religious educational functions and . . . ensure that State financial aid supports only the former.'" *Id.*, at 783, quoting *Lemon* v. *Kurtzman*, 403 U. S. 602, 613 (1971). By ensuring that parents will be reimbursed for tuition payments they make, the Minnesota statute requires that taxpayers in general pay for the cost of parochial education and extends a financial "incentive to parents to send their children to sectarian schools." *Nyquist*, 413 U. S., at 786. As was true of the law struck down in *Nyquist:*

> "[I]t is precisely the function of [Minnesota's] law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid—to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools—are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.*, at 783

That parents receive a reduction of their tax liability, rather than a direct reimbursement, is of no greater significance here than it was in *Nyquist.* "[F]or purposes of determining whether such aid has the effect of advancing religion," it makes no difference whether the qualifying "parent receives an actual cash payment [or] is allowed to reduce . . . the sum he would otherwise be obliged to pay over to the State." *Id.*, at 790–791. It is equally irrelevant whether a reduction in taxes takes the form of a tax "credit," a tax "modification," or a tax "deduction." *Id.*, at 789–790. What is of controlling significance is not the form but the "substantive impact" of the financial aid. *Id.*, at 786. "[I]nsofar as such benefits render assistance to parents who send their children to *sectarian* schools, their purpose and inevitable effect are to aid and advance those religious institutions." *Id.*, at 793 (emphasis added).

B

The majority attempts to distinguish *Nyquist* by pointing to two differences between the Minnesota tuition-assistance program and the program struck down in *Nyquist*. Neither of these distinctions can withstand scrutiny.

1

The majority first attempts to distinguish *Nyquist* on the ground that Minnesota makes all parents eligible to deduct up to $500 or $700 for each dependent, whereas the New York law allowed a deduction only for parents whose children attended nonpublic schools. Although Minnesota taxpayers who send their children to local public schools may not deduct tuition expenses because they incur none, they may deduct other expenses, such as the cost of gym clothes, pencils, and notebooks, which are shared by all parents of school-age children. This, in the majority's view, distinguishes the Minnesota scheme from the law at issue in *Nyquist*.

That the Minnesota statute makes some small benefit available to all parents cannot alter the fact that the most substantial benefit provided by the statute is available only to those parents who send their children to schools that charge tuition. It is simply undeniable that the single largest expense that may be deducted under the Minnesota statute is tuition. The statute is little more than a subsidy of tuition masquerading as a subsidy of general educational expenses. The other deductible expenses are *de minimis* in comparison to tuition expenses.

Contrary to the majority's suggestion, *ante*, at 401, the bulk of the tax benefits afforded by the Minnesota scheme are enjoyed by parents of parochial school children not because parents of public school children fail to claim deductions to which they are entitled, but because the latter are simply *unable* to claim the largest tax deduction that Minnesota authorizes.[2] Fewer than 100 of more than 900,000 school-age children in Minnesota attend public schools that charge a general tuition. Of the total number of taxpayers who are eligible for the tuition deduction, approximately 96% send their children to religious schools.[3] Parents who send their children to free public schools are simply ineligible to obtain the full benefit of the deduction except in the unlikely event that they buy $700 worth of pencils, notebooks, and bus rides for their school-age children. Yet parents who pay at least $700 in tuition to nonpublic, sectarian schools can claim the full deduction even if they incur no other educational expenses.

That this deduction has a primary effect of promoting religion can easily be determined without any resort to the type of "statistical evidence" that the majority fears would lead to constitutional uncertainty. *Ibid.* The only factual inquiry necessary is the same as that employed in *Nyquist* and *Sloan* v. *Lemon*, 413 U. S. 825 (1973): whether the deduction permitted for tuition expenses primarily benefits those who send their children to religious schools. In *Nyquist* we unequivocally rejected any suggestion that, in determining the effect of a tax statute, this Court should look exclusively to what the statute on its face purports to do and ignore the actual operation of the challenged provision. In determining the effect of the New York statute, we emphasized that "virtually all" of the schools receiving direct grants for maintenance and repair were Roman Catholic schools, 413 U. S., at 774, that reimbursements were given to parents "who send their children to nonpublic schools, the bulk of which is concededly sectarian in orientation," *id.*, at 780, that "it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian," *id.*, at 783, and that "tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools." *Id.*, at 794. Similarly, in *Sloan* v. *Lemon*, *supra*, at 830, we considered important to our "consider[ation of] the new law's effect . . . [that] 'more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith.'"[4]

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[2] Even if the Minnesota statute allowed parents of public school students to deduct expenses that were likely to be equivalent to the tuition expenses of private school students, it would still be unconstitutional. Insofar as the Minnesota statute provides a deduction for parochial school tuition, it provides a benefit to parochial schools that furthers the religious mission of those schools. *Nyquist* makes clear that the State may not provide any financial assistance to parochial schools unless that assistance is limited to secular uses. 413 U. S., at 780–785.

[3] Indeed, in this respect the Minnesota statute has an even greater tendency to promote religious education than the New York statute struck down in *Nyquist*, since the percentage of private schools that are nonsectarian is far greater in New York than in Minnesota.

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[4] Similarly, in *Meek* v. *Pittenger*, 421 U. S., at 363, we held that "the direct loan of instructional material and equipment has the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefiting from the Act." See *id.*, at 366. We relied on a finding that "of the 1,320 nonpublic schools in Pennsylvania that . . . qualify for aid under Act 195, more than 75% are church-related or religiously affiliated educational institutions." *Id.*, at 364. This could not possibly have been ascertained from the text of the facially neutral statute, but could only be determined on the basis of an "empirical inquiry." And in *Wolman* v. *Walter*, 433 U. S., at 234, the Court relied on a stipulation that "during the 1974–1975 school year there were 720 chartered nonpublic schools in Ohio. Of these, all but 29 were sectarian. More than 96% of the nonpublic enrollment attended sectarian schools, and more than 92% attended Catholic schools."

In this case, it is undisputed that well over 90% of the children attending tuition-charging schools in Minnesota are enrolled in sectarian schools. History and experience likewise instruct us that any generally available financial assistance for elementary and secondary school tuition expenses mainly will further religious education because the majority of the schools which charge tuition are sectarian. Cf. *Nyquist*, 413 U. S., at 785; *Lemon* v. *Kurtzman*, 403 U. S., at 628–630 (Douglas, J., concurring). Because Minnesota, like every other State, is committed to providing free public education, tax assistance for tuition payments inevitably redounds to the benefit of nonpublic, sectarian schools and parents who send their children to those schools.

2

The majority also asserts that the Minnesota statute is distinguishable from the statute struck down in *Nyquist* in another respect: the tax benefit available under Minnesota law is a "genuine tax deduction," whereas the New York law provided a benefit which, while nominally a deduction, also had features of a "tax credit." *Ante*, at 396, and n. 6. Under the Minnesota law, the amount of the tax benefit varies directly with the amount of the expenditure. Under the New York law, the amount of deduction was not dependent upon the amount actually paid for tuition but was a predetermined amount which depended on the tax bracket of each taxpayer. The deduction was designed to yield roughly the same amount of tax "forgiveness" for each taxpayer.

This is a distinction without a difference. Our prior decisions have rejected the relevance of the majority's formalistic distinction between tax deductions and the tax benefit at issue in *Nyquist*. See *Byrne* v. *Public Funds for Public Schools*, 442 U. S. 907 (1979), summarily aff'g 590 F. 2d 514 (CA3); *Grit* v. *Wolman*, 413 U. S. 901 (1973), summarily aff'g *Kosydar* v. *Wolman*, 353 F. Supp. 744 (SD Ohio 1972).[5]

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[5] In *Byrne* v. *Public Funds for Public Schools*, we summarily affirmed a decision striking down a program of tax deductions. The amount of de-

The deduction afforded by Minnesota law was "designed to yield a [tax benefit] in exchange for performing a specific act which the State desires to encourage." *Nyquist, supra*, at 789. Like the tax benefit held impermissible in *Nyquist*, the tax deduction at issue here concededly was designed to "encourag[e] desirable expenditures for educational purposes." *Ante*, at 396. Of equal importance, as the majority also concedes, the "economic consequenc[e]" of these programs is the same, *ante*, at 397, n. 6, for in each case the "financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools." *Ante*, at 399. See *Walz* v. *Tax Comm'n*, 397 U. S. 664, 699 (1970) (opinion of Harlan, J.). It was precisely the substantive impact of the financial support, and not its particular form, that rendered the programs in *Nyquist* and *Sloan*

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duction was fixed at $1,000 for each dependent attending a tuition-charging nonpublic school. This decision makes clear that the constitutionality of a tax benefit does not turn on whether the benefit is in the form of a deduction from gross income or a tax "credit."

In *Grit* v. *Wolman*, we summarily affirmed a decision invalidating a system of tax credits for nonpublic school parents in which the amount of the credit depended on the amount of tuition paid. This decision demonstrates that it is irrelevant whether the amount of a tax benefit is proportionate to the amount of tuition paid or is simply an arbitrary sum. The Court's affirmance of the result in each of these cases was a "decision on the merits, entitled to precedential weight." *Meek* v. *Pittenger*, *supra*, at 366–367, n. 16.

The deduction at issue in this case does differ from the tax benefits in *Nyquist* and our other prior cases in one respect: by its very nature the deduction embodies an inherent limit on the extent to which a State may subsidize religious education. Unlike a tax credit, which may wholly subsidize the cost of religious education if the size of the credit is sufficiently large, or a tax deduction of an arbitrary sum, a deduction of tuition payments from adjusted gross income can never "provide a basis for . . . *complete subsidization* of . . . religious schools." *Nyquist*, 413 U. S., at 782, n. 38 (emphasis in original). See also *id.*, at 779, 787, n. 44. *Nyquist* made clear, however, that absolutely no subsidization is permissible unless it is restricted to the purely secular functions of those schools. See, *e. g.*, *id.*, at 777–779, 787–788.

v. *Lemon* unconstitutional. See *Nyquist*, *supra*, at 790–791, 794; *Sloan* v. *Lemon*, 413 U. S., at 832.

C

The majority incorrectly asserts that Minnesota's tax deduction for tuition expenses "bears less resemblance to the arrangement struck down in *Nyquist* than it does to assistance programs upheld in our prior decisions and those discussed with approval in *Nyquist*." *Ante*, at 394. One might as well say that a tangerine bears less resemblance to an orange than to an apple. The two cases relied on by the majority, *Board of Education* v. *Allen*, 392 U. S. 236 (1968), and *Everson* v. *Board of Education*, 330 U. S. 1 (1947), are inapposite today for precisely the same reasons that they were inapposite in *Nyquist*.

We distinguished these cases in *Nyquist*, *supra*, at 781–782, and again in *Sloan* v. *Lemon*, *supra*, at 832. Financial assistance for tuition payments has a consequence that

> "is quite unlike the sort of 'indirect' and 'incidental' benefits that flowed to sectarian schools from programs aiding *all* parents by supplying bus transportation and secular textbooks for their children. *Such benefits were carefully restricted to the purely secular side of church-affiliated institutions* and provided no special aid for those who had chosen to support religious schools. Yet such aid approached the 'verge' of the constitutionally impermissible." *Sloan* v. *Lemon*, *supra*, at 832 (latter emphasis added).

As previously noted, *supra*, at 409, the Minnesota tuition tax deduction is not available to *all* parents, but only to parents whose children attend schools that charge tuition, which are comprised almost entirely of sectarian schools. More importantly, the assistance that flows to parochial schools as a result of the tax benefit is not restricted, and cannot be restricted, to the secular functions of those schools.

II

In my view, Minnesota's tax deduction for the cost of textbooks and other instructional materials is also constitutionally infirm. The majority is simply mistaken in concluding that a tax deduction, unlike a tax credit or a direct grant to parents, promotes religious education in a manner that is only "attenuated." *Ante*, at 399, 400. A tax deduction has a primary effect that advances religion if it is provided to offset expenditures which are not restricted to the secular activities of parochial schools.

The instructional materials which are subsidized by the Minnesota tax deduction plainly may be used to inculcate religious values and belief. In *Meek* v. *Pittenger*, 421 U. S., at 366, we held that even the use of "wholly neutral, secular instructional material and equipment" by church-related schools contributes to religious instruction because "'[t]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence.'" In *Wolman* v. *Walter*, 433 U. S., at 249–250, we concluded that precisely the same impermissible effect results when the instructional materials are loaned to the pupil or his parent, rather than directly to the schools. We stated that "it would exalt form over substance if this distinction were found to justify a result different from that in *Meek*." *Id.*, at 250. It follows that a tax deduction to offset the cost of purchasing instructional materials for use in sectarian schools, like a loan of such materials to parents, "necessarily results in aid to the sectarian school enterprise as a whole" and is therefore a "substantial advancement of religious activity" that "constitutes an impermissible establishment of religion." *Meek* v. *Pittenger*, *supra*, at 366.

There is no reason to treat Minnesota's tax deduction for textbooks any differently. Secular textbooks, like other secular instructional materials, contribute to the religious mission of the parochial schools that use those books. Although this Court upheld the loan of secular textbooks to religious schools in *Board of Education* v. *Allen, supra,* the Court believed at that time that it lacked sufficient experience to determine "based solely on judicial notice" that "the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public [will always be] instrumental in the teaching of religion." 392 U. S., at 248. This basis for distinguishing secular instructional materials and secular textbooks is simply untenable, and is inconsistent with many of our more recent decisions concerning state aid to parochial schools. See *Wolman* v. *Walter,* 433 U. S., at 257–258 (MARSHALL, J., concurring in part and dissenting in part); *id.,* at 264–266 (STEVENS, J., concurring in part and dissenting in part); *Meek* v. *Pittenger, supra,* at 378 (BRENNAN, J., concurring in part and dissenting in part).

In any event, the Court's assumption in *Allen* that the textbooks at issue there might be used only for secular education was based on the fact that those very books had been chosen by the State for use in the public schools. 392 U. S., at 244–245. In contrast, the Minnesota statute does not limit the tax deduction to those books which the State has approved for use in public schools. Rather, it permits a deduction for books that are chosen by the parochial schools themselves. Indeed, under the Minnesota statutory scheme, textbooks chosen by parochial schools but not used by public schools are likely to be precisely the ones purchased by parents for their children's use. Like the law upheld in *Board of Education* v. *Allen, supra,* Minn. Stat. §§ 123.932 and 123.933 (1982) authorize the State Board of Education to provide textbooks used in public schools to nonpublic school students. Parents have little reason to purchase textbooks that can be borrowed under this provision.[6]

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[6] For similar reasons, I would hold that the deduction for transportation expenses is constitutional only insofar as it relates to the costs of traveling between home and school. See *Wolman* v. *Walter,* 433 U. S., at 252–255 (reimbursement of nonpublic schools for field trip transportation impermis-

III

There can be little doubt that the State of Minnesota intended to provide, and has provided, "[s]ubstantial aid to the educational function of [church-related] schools," and that the tax deduction for tuition and other educational expenses "necessarily results in aid to the sectarian school enterprise as a whole." *Meek* v. *Pittenger*, *supra*, at 366. It is beside the point that the State may have legitimate secular reasons for providing such aid. In focusing upon the contributions made by church-related schools, the majority has lost sight of the issue before us in this case.

> "The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction . . . . The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn." *Lemon* v. *Kurtzman*, 403 U. S., at 625.

In my view, the lines drawn in *Nyquist* were drawn on a reasoned basis with appropriate regard for the principles of neutrality embodied by the Establishment Clause. I do not believe that the same can be said of the lines drawn by the majority today. For the first time, the Court has upheld financial support for religious schools without any reason at all to assume that the support will be restricted to the secular functions of those schools and will not be used to support reli-

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sibly fosters religion because the nonpublic schools control the timing, frequency, and destination of the trips, which, for sectarian schools, are an integral part of the sectarian education). I would therefore reverse the judgment of the Court of Appeals and remand for a determination whether the insignificant deductions that remain—*e. g.*, deductions for transportation between home and school and for pencils and notebooks—are severable from the other deductions.

gious instruction. This result is flatly at odds with the fundamental principle that a State may provide no financial support whatsoever to promote religion. As the Court stated in *Everson*, 330 U. S., at 16, and has often repeated, see, *e. g.*, *Meek* v. *Pittenger*, 421 U. S., at 359; *Nyquist*, 413 U. S., at 780:

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

I dissent.

UNITED STATES *v.* SELLS ENGINEERING, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-1032. Argued March 2, 1983—Decided June 30, 1983

After respondents, a company having contracts with the Navy and company officials, were indicted by a federal grand jury for conspiracy to defraud the United States and tax fraud, the parties reached a plea bargain under which the individual respondents pleaded guilty to a count of conspiracy to defraud the Government by obstructing an Internal Revenue Service investigation, and other counts against respondents were dismissed. Thereafter, the Government moved for disclosure of all grand jury materials to attorneys in the Justice Department's Civil Division, their paralegal and secretarial assistants, and certain Defense Department experts for use in preparing and conducting a possible civil suit against respondents under the False Claims Act. The District Court granted disclosure, concluding that Civil Division attorneys are entitled to disclosure as a matter of right under Federal Rule of Criminal Procedure 6(e)(3)(A)(i) (hereinafter (A)(i)), which authorizes disclosure of grand jury materials without a court order to "an attorney for the government for use in the performance of such attorney's duty." The court also stated that disclosure was warranted because the Government had shown particularized need for disclosure. The Court of Appeals vacated and remanded, holding (1) that Civil Division attorneys could obtain disclosure only by showing particularized need under Rule 6(e)(3)(C)(i) (hereinafter (C)(i)), which authorizes disclosure "when so directed by a court preliminarily to or in connection with a judicial proceeding," and (2) that the District Court had not applied a correct standard of particularized need.

Held:

1. Attorneys in the Civil Division of the Justice Department and their assistants and staff may not obtain automatic (A)(i) disclosure of grand jury materials for use in a civil suit, but must instead seek a (C)(i) court order for access to such materials. Pp. 427–442.

(a) The automatic disclosure authorized by (A)(i) is limited to those attorneys who conduct the criminal matters to which the grand jury materials pertain. Rule 6(e) was not intended to grant free access to grand jury materials to Government attorneys other than prosecutors, who perform a special role in assisting the grand jury in its functions and who must know what transpires before the grand jury in order to perform their own prosecutorial duties. Allowing automatic disclosure to nonprosecutors for civil use would increase the risk of inadvertent or illegal release of grand jury materials to others and render considerably more concrete the threat to the willingness of witnesses to come forward and testify fully and candidly before the grand jury; would pose a significant threat to the integrity of the grand jury itself by tempting prosecutors to manipulate the grand jury's powerful investigative tools to improperly elicit evidence for use in a civil case; and would threaten to subvert the limitations under federal laws applied outside the grand jury context on the Government's powers of discovery and investigation. Pp. 427–435.

(b) The fact that, when subparagraph 6(e)(3)(A)(ii) was added by Congress in 1977 to allow access to grand jury materials by nonattorneys assisting Government attorneys, (A)(ii) was limited to assisting the attorney in the "performance of [his] duty to enforce federal criminal law" does not establish that Congress intended to place the limitation to criminal matters on (A)(ii) disclosure but not on (A)(i) disclosure. The legislative history shows instead that Congress merely made explicit what it believed to be already implicit in (A)(i)'s language (which has been in the Rule since its inception in 1946). Congress' concerns that grand jury materials not be disclosed for civil use without a court order and that statutory limits on civil discovery not be subverted apply to disclosure for civil use by attorneys within the Justice Department as fully as to similar use by other Government agencies. Pp. 435–442.

2. A strong showing of particularized need for grand jury materials must be made before any (C)(i) disclosure will be permitted by court order. The party seeking disclosure must show that the material sought is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that the request is structured to cover only material so needed. *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U. S. 211. This standard governs disclosure to Government officials as well as to private parties, but is flexible and accommodates any relevant considerations, peculiar to Government movants, that weigh for or against disclosure in a given case. Here, the District Court's explanation of its finding of particularized need amounted to little more than its statement that the grand jury materials were rationally related to the civil fraud suit to be brought by the Civil Division, and the Court of Appeals correctly held that this was insufficient and remanded for reconsideration under the proper legal standard. Pp. 442–446.

642 F. 2d 1184, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which POWELL, REHNQUIST, and O'CONNOR, JJ., joined, *post*, p. 446.

Douglas Letter argued the cause for the United States. With him on the briefs were *Solicitor General Lee, Assistant Attorney General McGrath, Deputy Solicitor General Geller, Joshua I. Schwartz*, and *Leonard Schaitman.*

Arlington Ray Robbins argued the cause for respondents. With him on the brief were *Michael E. Cahill* and *David P. Curnow.**

JUSTICE BRENNAN delivered the opinion of the Court.

The question in this case is under what conditions attorneys for the Civil Division of the Justice Department, their paralegal and secretarial staff, and all other necessary assistants, may obtain access to grand jury materials, compiled with the assistance and knowledge of other Justice Department attorneys, for the purpose of preparing and pursuing a civil suit. We hold that such access is permissible only when the Government moves for court-ordered disclosure under Federal Rule of Criminal Procedure 6(e)(3)(C)(i) and makes the showing of particularized need required by that Rule.

I

Respondents Peter A. Sells and Fred R. Witte were officers of respondent Sells Engineering, Inc. That company

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*Briefs of *amici curiae* urging affirmance were filed by *Morris Harrell* and *Richard L. Aynes* for the American Bar Association; by *Thomas E. Holliday, Fred Okrand, Charles S. Sims*, and *Burt Neuborne* for the American Civil Liberties Union Foundation et al.; by *Erwin N. Griswold* and *Otis M. Smith* for General Motors Corp.; and by *Thomas J. Donnelly* for Miller Brewing Co.

Patrick Henry, pro se, Mark D. Cohen, and *James J. O'Rourke* filed a brief for the District Attorney of Suffolk County, New York, as *amicus curiae.*

had contracts with the United States Navy to produce airborne electronic devices designed to interfere with enemy radar systems. In 1974, a Special Agent of the Internal Revenue Service began a combined criminal and civil administrative investigation of respondents. The Agent issued administrative summonses for certain corporate records of Sells Engineering. When the corporation refused to comply, the Agent obtained a District Court order enforcing the summonses. Enforcement was stayed, however, pending appeal.

While the enforcement case was pending in the Court of Appeals, a federal grand jury was convened to investigate charges of criminal fraud on the Navy and of evasion of federal income taxes. The grand jury subpoenaed, and respondents produced, many of the same materials that were the subject of the IRS administrative summonses.[1] The grand jury indicted all three respondents on two counts of conspiracy to defraud the United States[2] and nine counts of tax fraud.[3] Respondents moved to dismiss the indictment, alleging grand jury misuse for civil purposes. Before the motion was decided, however, the parties reached a plea bargain. The individual respondents each pleaded guilty to one count of conspiracy to defraud the Government by obstructing an IRS investigation. All other counts were dismissed, and respondents withdrew their charges of grand jury misuse.

Thereafter, the Government moved for disclosure of all grand jury materials to attorneys in the Justice Department's Civil Division, their paralegal and secretarial assistants, and certain Defense Department experts, for use in preparing and conducting a possible civil suit against respondents under the False Claims Act, 31 U. S. C. § 231 *et seq.*[4] Respondents opposed the disclosure, renewing their allegations of grand jury misuse. The District Court granted the requested disclosure, concluding that attorneys in the Civil Division are entitled to disclosure as a matter of right under Rule 6(e)(3)(A)(i). The court also stated that disclosure to Civil Division attorneys and their nonattorney assistants was warranted because the Government had shown particularized need for disclosure.[5] The Court of Appeals vacated and remanded, holding that Civil Division attorneys could obtain disclosure only by showing particularized need under Rule 6(e)(3)(C)(i), and that the District Court had not applied a correct standard of particularized need. *In re Grand Jury Investigation No. 78-184 (Sells, Inc.)*, 642 F. 2d 1184 (CA9 1981).[6] We granted certiorari, 456 U. S. 960 (1982). We now affirm.

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[1] The Court of Appeals, upon learning this, remanded the summons enforcement action for reconsideration. The Government did not pursue the matter further, and the suit was dismissed for want of prosecution.

[2] 18 U. S. C. § 371.

[3] 26 U. S. C. § 7206(2).

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[4] Although the Government has always contended that the Civil Division attorneys are entitled to disclosure without any court order, the Government chose to request permission for disclosure from the District Court. It stated that it thought no order necessary, but requested an order in the alternative. Record 519–522; see Tr. of Oral Arg. 5–9.

[5] The District Court found it unnecessary to pass on the allegations of grand jury misuse, but it stated without elaboration that had it considered the issue it would have found no such misuse. App. to Pet. for Cert. 24a.

[6] The District Court refused to stay disclosure. A single Circuit Judge did issue an interim stay, but a two-judge panel vacated it and refused a further stay. Hence, the Civil Division attorneys and their assistants enjoyed access to the grand jury materials for more than two years while this case was pending in the Court of Appeals. During this time the Government filed its False Claims Act suit against respondents. The Civil Division has been denied access since the Court of Appeals issued its mandate.

The Government argued in the Court of Appeals that the case was moot because the disclosure sought to be prevented had already occurred. The Court of Appeals correctly rejected the contention:

"The controversy here is still a live one. By its terms the disclosure order grants access to all attorneys for the Civil Division, their paralegal and secretarial staff, and all other necessary assistants. Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional

II

A

The grand jury has always occupied a high place as an instrument of justice in our system of criminal law—so much so that it is enshrined in the Constitution. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395, 399 (1959); *Costello* v. *United States*, 350 U. S. 359, 361–362 (1956). It serves the "dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." *Branzburg* v. *Hayes*, 408 U. S. 665, 686–687 (1972) (footnote omitted). It has always been extended extraordinary powers of investigation and great responsibility for directing its own efforts:

> "Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. 'It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.'" *United States* v. *Calandra*, 414 U. S. 338, 343 (1974), quoting *Blair* v. *United States*, 250 U. S. 273, 282 (1919).

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personnel and by the continued access of those to whom the materials have already been disclosed. We cannot restore the secrecy that has already been lost but we can grant partial relief by preventing further disclosure." *In re Grand Jury Investigation No. 78–184 (Sells, Inc.)*, 642 F. 2d, at 1187–1188.

These broad powers are necessary to permit the grand jury to carry out both parts of its dual function. Without thorough and effective investigation, the grand jury would be unable either to ferret out crimes deserving of prosecution, or to screen out charges not warranting prosecution. *Branzburg*, *supra*, at 688; *Calandra*, *supra*, at 343. See also *United States* v. *Dionisio*, 410 U. S. 1, 12–13 (1973); *United States* v. *Johnson*, 319 U. S. 503, 510–512 (1943); *Hale* v. *Henkel*, 201 U. S. 43, 59–66 (1906).

The same concern for the grand jury's dual function underlies the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts." *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 681 (1958) (footnote omitted).

> "We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings. In particular, we have noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule." *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U. S. 211, 218–219 (1979) (footnotes and citation omitted).

Grand jury secrecy, then, is "as important for the protection of the innocent as for the pursuit of the guilty." *Johnson*, *supra*, at 513. Both Congress and this Court have consistently stood ready to defend it against unwarranted intrusion. In the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of this secrecy has been authorized. See *Illinois* v. *Abbott & Associates, Inc.*, 460 U. S. 557, 572–573 (1983).

B

Rule 6(e) of the Federal Rules of Criminal Procedure codifies the traditional rule of grand jury secrecy. Paragraph 6(e)(2) provides that grand jurors, Government attorneys and their assistants, and other personnel attached to the grand jury are forbidden to disclose matters occurring before the grand jury. Witnesses are not under the prohibition unless they also happen to fit into one of the enumerated classes. Paragraph 6(e)(3) sets forth four exceptions to this nondisclosure rule.[7]

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[7] Rules 6(e)(2) and (3), as presently in force, provide as follows:

"(e) Recording and Disclosure of Proceedings

. . . . .

"(2) General Rule of Secrecy.—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

"(3) Exceptions.

"(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

"(i) an attorney for the government for use in the performance of such attorney's duty; and

"(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

"(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any

Subparagraph 6(e)(3)(A) contains two authorizations for disclosure as a matter of course, without any court order. First, under subparagraph 6(e)(3)(A)(i), disclosure may be made without a court order to "an attorney for the government for use in the performance of such attorney's duty" (referred to hereinafter as "(A)(i) disclosure"). "Attorney for the government" is defined in Rule 54(c) in such broad terms as potentially to include virtually every attorney in the Department of Justice.[8] Second, under subparagraph 6(e)(3)(A)(ii), grand jury materials may likewise be provided to "government personnel . . . [who] assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law" ("(A)(ii) disclosure"). Subparagraph 6(e)(3)(B) further regulates (A)(ii) disclosure,

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purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

"(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

"(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

"(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

"If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct."

A fifth exception has been created this Term in an amendment to Rule 6(e), to take effect August 1, 1983. 461 U. S. 1121 (1983). The amendment adds a new subparagraph 6(e)(3)(C)(iii), permitting disclosure "when the disclosure is made by an attorney for the government to another federal grand jury." The Advisory Committee's Note points out that secrecy is not thereby compromised, since the second grand jury is equally under Rule 6's requirement of secrecy.

[8] "'Attorney for the government' means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, [and] an authorized assistant of a United States Attorney . . . ." See also n. 12, *infra*.

forbidding use of grand jury materials by "government personnel" for any purpose other than assisting an attorney for the Government in his enforcement of criminal law, and requiring that the names of such personnel be provided to the district court.

Subparagraph 6(e)(3)(C) also authorizes courts to order disclosure. Under subparagraph 6(e)(3)(C)(i), a court may order disclosure "preliminarily to or in connection with a judicial proceeding" (a "(C)(i) order").[9] Under subparagraph 6(e)(3)(C)(ii), a court may order disclosure under certain conditions at the request of a defendant. See also n. 7, *supra*.

The main issue in this case is whether attorneys in the Justice Department may obtain automatic (A)(i) disclosure of grand jury materials for use in a civil suit, or whether they must seek a (C)(i) court order for access. If a (C)(i) order is necessary, we must address the dependent question of what standards should govern issuance of the order.

III

The Government contends that all attorneys in the Justice Department qualify for automatic disclosure of grand jury materials under (A)(i), regardless of the nature of the litigation in which they intend to use the materials. We hold that (A)(i) disclosure is limited to use by those attorneys who conduct the criminal matters to which the materials pertain. This conclusion is mandated by the general purposes and policies of grand jury secrecy, by the limited policy reasons why Government attorneys are granted access to grand jury materials for criminal use, and by the legislative history of Rule 6(e).

A

The Government correctly contends that attorneys for the Civil Division of the Justice Department are within the class of "attorneys for the government" to whom (A)(i) allows disclosure without a court order. Rule 54(c) defines the phrase expansively, to include "authorized assistant[s] of the Attorney General"; 28 U. S. C. § 515(a) provides that the Attorney General may direct any attorney employed by the Department to conduct "any kind of legal proceeding, civil or criminal, including grand jury proceedings . . . ." See also § 518(b). In short, as far as Rules 6 and 54 are concerned, it is immaterial that certain attorneys happen to be assigned to a unit called the Civil Division, or that their usual duties involve only civil cases. If, for example, the Attorney General (for whatever reason) were to detail a Civil Division attorney to conduct a criminal grand jury investigation, nothing in Rule 6 would prevent that attorney from doing so; he need not secure a transfer out of the Civil Division.[10]

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[9] See generally *United States* v. *Baggot*, *post*, p. 476.

It does not follow, however, that any Justice Department attorney is free to rummage through the records of any grand jury in the country, simply by right of office. Disclosure under (A)(i) is permitted only "in the performance of such attorney's duty." The heart of the primary issue in this case is whether performance of duty, within the meaning of (A)(i), includes preparation and litigation of a civil suit by a Justice Department attorney who had no part in conducting the related criminal prosecution.

Given the strong historic policy of preserving grand jury secrecy, one might wonder why Government attorneys are given any automatic access at all. The draftsmen of the original Rule 6 provided the answer:

> "Government attorneys are entitled to disclosure of grand jury proceedings, other than the deliberations and the votes of the jurors, inasmuch as they may be present in the grand jury room during the presentation of evidence. The rule continues this practice." Advisory

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[10] See generally 8 J. Moore, Moore's Federal Practice ¶ 6.04[7] (2d ed. 1983); 1 C. Wright, Federal Practice and Procedure § 105 (2d ed. 1982). But see n. 12, *infra*.

> Committee's Notes on Federal Rule of Criminal Procedure 6(e), 18 U. S. C. App., p. 1411.

This is potent evidence that Rule 6(e) was never intended to grant free access to grand jury materials to attorneys not working on the criminal matters to which the materials pertain. The Advisory Committee's explanation strongly suggests that automatic access to grand jury materials is available only to those attorneys for the Government who would be entitled to appear before the grand jury.[11] But Government attorneys are allowed into grand jury rooms, not for the general and multifarious purposes of the Department of Justice, but because both the grand jury's functions and their own *prosecutorial* duties require it.[12] As the Advisory Committee suggested, the same reasoning applies to disclosure of grand jury materials outside the grand jury room.

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[11] We do not mean to suggest that (A)(i) access to grand jury materials is limited to those prosecutors who actually *did* appear before the grand jury. If that were so, the Government would be arbitrarily foreclosed from increasing or changing the staffing of a given criminal case after indictment, or even from replacing an attorney who leaves Government service. Moreover, there would be little point to such an interpretation, since anyone working on a given prosecution would clearly be *eligible* under Rule 6(d) to enter the grand jury room, even if particular individuals did not have occasion to do so. Rather, as the history discussed by the dissent, *post*, at 452–455, shows, the intent of the Rule is that every attorney (including a supervisor) who is working on a prosecution may have access to grand jury materials, at least while he is conducting criminal matters. Cf. n. 15, *infra*. See Hearings on Proposed Amendments to the Federal Rules of Criminal Procedure before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 95th Cong., 1st Sess., 46–47 (1977) (hereinafter House Hearings); *id.*, at 67 (testimony of Department of Justice representative that every member of the prosecution "team" is entitled to automatic access); *infra*, at 439–440. Nothing in these sources or those cited by the dissent, however, suggests that the draftsmen of Rule 6(d) or (e) intended that Justice Department attorneys *not* working on a prosecution should have automatic access. On the contrary, the passages quoted *post*, at 452–455, show fairly clearly that the reason why it was thought desirable to allow disclosure to other prosecutors was to facilitate effective working of the *prosecution* team.

[12] Indeed, the Courts of Appeals have held or assumed that even an attorney from the Justice Department's *Criminal* Division may appear before a

The purpose of the grand jury requires that it remain free, within constitutional and statutory limits, to operate "independently of either prosecuting attorney or judge." *Stirone* v. *United States*, 361 U. S. 212, 218 (1960) (footnote omitted). Nevertheless, a modern grand jury would be much less effective without the assistance of the prosecutor's office and the investigative resources it commands. The prosecutor ordinarily brings matters to the attention of the grand jury and gathers the evidence required for the jury's consideration. Although the grand jury may itself decide to investigate a matter or to seek certain evidence, it depends largely on the prosecutor's office to secure the evidence or witnesses it requires.[13] The prosecutor also advises the lay jury on the applicable law. The prosecutor in turn needs to know what transpires before the grand jury in order to perform his own duty properly. If he considers that the law and the admissible evidence will not support a conviction, he can be expected to advise the grand jury not to indict. He must also examine indictments, and the basis for their issuance, to determine whether it is in the interests of justice to proceed with prosecution.[14]

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grand jury only if he has been authorized to conduct grand jury proceedings under 28 U. S. C. § 515(a), § 543(a), or a similar statute, because only with such credentials would the attorney be an "*authorized* assistant of the Attorney General" as required by Rule 54(c). *E. g.*, *United States* v. *Prueitt*, 540 F. 2d 995, 999–1003 (CA9 1976); *In re Persico*, 522 F. 2d 41, 46 (CA2 1975); *United States* v. *Wrigley*, 520 F. 2d 362 (CA8 1975).

[13] Not only would the prosecutor ordinarily draw up and supervise the execution of subpoenas, but also he commands the investigative forces that might be needed to find out what the grand jury wants to know. See also, *e. g.*, 18 U. S. C. § 6003 (United States Attorney to request order granting use immunity).

[14] See generally *United States* v. *Calandra*, 414 U. S. 338, 351 (1974); *Hale* v. *Henkel*, 201 U. S. 43, 60, 65 (1906); Fed. Rule Crim. Proc. 7(c)(1) (prosecutor to sign indictment); National District Attorneys Association, National Prosecution Standards 14.2–E, 14.4, and accompanying commen-

None of these considerations, however, provides any support for breaching grand jury secrecy in favor of Government attorneys *other than prosecutors*—either by allowing them into the grand jury room, or by granting them uncontrolled access to grand jury materials. An attorney with only civil duties lacks both the prosecutor's special role in supporting the grand jury, and the prosecutor's own crucial need to know what occurs before the grand jury.[15]

Of course, it would be of substantial help to a Justice Department civil attorney if he had free access to a storehouse of evidence compiled by a grand jury; but that is of a different order from the prosecutor's need for access. The civil lawyer's need is ordinarily nothing more than a matter of saving time and expense. The same argument could be made for access on behalf of any lawyer in another Government agency, or indeed, in private practice. We have consistently rejected the argument that such savings can justify a breach of grand jury secrecy. *E. g.*, *Procter & Gamble*, 356 U. S., at 682–683; *Smith* v. *United States*, 423 U. S. 1303, 1304 (1975) (Douglas, J., in chambers); see also *Abbott*, 460 U. S., at 565–573. In most cases, the same evidence that could be obtained from the grand jury will be available through ordinary discovery or other routine avenues of investigation. If, in a particular case, ordinary discovery is insufficient for some reason, the Government may request disclosure under a (C)(i) court order. See Part IV, *infra*.

Not only is disclosure for civil use unjustified by the considerations supporting prosecutorial access, but also it threatens to do affirmative mischief. The problem is threefold.

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tary (1977); ABA Standards for Criminal Justice 3–3.5, 3–3.6 (2d ed. 1980); ABA Section of Criminal Justice, ABA Grand Jury Policy and Model Act 4–9, 12 (2d ed. 1982).

[15] This case involves only access by Civil Division attorneys who played no part in the criminal prosecution of respondents. It does not present any issue concerning continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the criminal prosecution. We decline to address that problem in this case.

First, disclosure to Government bodies raises much the same concerns that underlie the rule of secrecy in other contexts. Not only does disclosure increase the number of persons to whom the information is available (thereby increasing the risk of inadvertent or illegal release to others),[16] but also it renders considerably more concrete the threat to the willingness of witnesses to come forward and to testify fully and candidly. If a witness knows or fears that his testimony before the grand jury will be routinely available for use in governmental civil litigation or administrative action, he may well be less willing to speak for fear that he will get himself into trouble in some other forum. Cf. *Pillsbury Co.* v. *Conboy*, 459 U. S. 248, 263, n. 23 (1983).

Second, because the Government takes an active part in the activities of the grand jury, disclosure to Government attorneys for civil use poses a significant threat to the integrity of the grand jury itself. If prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely. Any such use of grand jury proceedings to elicit evidence for use in a civil case is improper *per se*. *Procter & Gamble, supra*, at 683–684. We do not mean to impugn the professional characters of Justice Department lawyers in general; nor do we express any view on the allegations of misuse that have been made in this case, see n. 36, *infra*. Our concern is based less on any belief that grand jury misuse is in fact widespread than on our concern that, if and when it does occur, it would often be very difficult to detect and prove. Moreover, as the legislative history discussed *infra*, Part III–B, shows, our concern over possible misappropriation of the grand jury itself was shared by Congress when it enacted the present version of Rule 6(e). Such a potential for misuse should not be allowed absent a clear mandate in the law.

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[16] But see *infra*, at 445.

Third, use of grand jury materials by Government agencies in civil or administrative settings threatens to subvert the limitations applied outside the grand jury context on the Government's powers of discovery and investigation. While there are some limits on the investigative powers of the grand jury,[17] there are few if any other forums in which a governmental body has such relatively unregulated power to compel other persons to divulge information or produce evidence. Other agencies, both within and without the Justice Department, operate under specific and detailed statutes, rules, or regulations conferring only limited authority to require citizens to testify or produce evidence. Some agencies have been granted special statutory powers to obtain information and require testimony in pursuance of their duties. Others (including the Civil Division[18]) are relegated to the usual course of discovery under the Federal Rules of Civil Procedure. In either case, the limitations imposed on investigation and discovery exist for sound reasons—ranging from fundamental fairness to concern about burdensomeness and intrusiveness. If Government litigators or investigators in civil matters enjoyed unlimited access to grand jury material, though, there would be little reason for them to resort to their usual, more limited avenues of investigation. To allow these agencies to circumvent their usual methods of discovery would not only subvert the limitations and procedural requirements built into those methods, but also would grant to the Government a virtual *ex parte* form of discovery, from which its civil litigation opponents are excluded unless they make a strong showing of particularized need. In civil litigation as in criminal, "it is rarely justifiable for the [Government] to have exclusive access to a storehouse of relevant fact." *Dennis* v. *United States*, 384 U. S. 855, 873 (1966) (footnote omitted). We are reluctant to conclude that the draftsmen of Rule 6 intended so remarkable a result.[19]

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[17] See, *e. g., Calandra*, 414 U. S., at 346, and n. 4; *United States* v. *Dionisio*, 410 U. S. 1, 11–12 (1973); *Branzburg* v. *Hayes*, 408 U. S. 665, 688, 707–708 (1972); *id.*, at 709–710 (POWELL, J., concurring); *Curcio* v. *United States*, 354 U. S. 118 (1957); *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920); *Hale*, 201 U. S., at 75–77.

[18] Title 31 U. S. C. § 232(F) (1976 ed., Supp. V) provides that in suits under the False Claims Act (such as the one brought by the Government here), subpoenas for trial testimony may be served anywhere in the United States, rather than in the limited area provided for in Federal Rule of Civil Procedure 45(e). Section 232(F), however, does not affect Rule 45(d), regulating subpoenas for depositions.

In short, if grand juries are to be granted extraordinary powers of investigation because of the difficulty and importance of their task, the use of those powers ought to be limited as far as reasonably possible to the accomplishment of the task.[20] The policies of Rule 6 require that any disclosure to attorneys other than prosecutors be judicially supervised rather than automatic.

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[19] The Government contends that the issue of Government access for civil use was settled in *United States* v. *Procter & Gamble Co.*, 356 U. S. 677 (1958). We disagree. In that case, the Government was using grand jury materials to press a civil antitrust suit. The defendants sought to discover the materials under Federal Rule of Civil Procedure 34; we held that such discovery was impermissible without a showing of particularized need. We rejected the defendants' argument that they should obtain discovery because the Government had improperly used the grand jury as a civil discovery device, noting that there was "no finding that the grand jury proceeding was used as a short cut to goals otherwise barred or more difficult to reach." *Id.*, at 683. The passages from that decision so heavily relied on by the dissent, *post*, at 457–458, are simply the Court's recognition that civil use of properly created grand jury materials is not *per se* illegal. The Court did not address, however, the *conditions* under which such civil use by the Government could be permitted, since the issue in the case was only whether private parties could obtain access. In particular, no issue was presented in the case as to whether, having used the grand jury for strictly criminal purposes, the Government should have been permitted to use the grand jury's records for civil ends (whether through the same attorneys or different ones, cf. n. 15, *supra*) *without a court order*. The Court's opinion did not discuss that aspect of the case at all. Justice Whittaker, concurring, did address it, suggesting that a court order should be required in at least some cases. 356 U. S., at 684–685. Since Justice Whittaker joined the majority opinion, however, he at least did not interpret that opinion as the Government now reads it.

B

The Government argues that its reading of Rule 6 is compelled by a textual comparison of subparagraph 6(e)(3)(A)(i) with subparagraph 6(e)(3)(A)(ii). It points out that the former restricts a Government attorney's use of grand jury materials to "the performance of such attorney's duty," while the latter refers more specifically to "performance of such attorney's duty *to enforce federal criminal law*" (emphasis added). The inclusion in (A)(ii) of an express limitation to criminal matters, and the absence of that limitation in the otherwise similar language of (A)(i), the Government argues, show that Congress intended to place the limitation to criminal matters on (A)(ii) disclosure but not on (A)(i) disclosure. The argument is admittedly a plausible one. If we had nothing more to go on than the bare text of the Rule, and if the subject matter at hand were something less sensitive than grand jury secrecy, we might well adopt that reasoning. The argument is not so compelling, nor the language so plain, however, as to overcome the strong arguments to the contrary drawn both from policy, *supra*, Part III–A, and from legislative history.

It is material in this connection that the two subparagraphs are not of contemporaneous origin. The present (A)(i) language has been in the Rule since its inception in 1946; the (A)(ii) provision was added by Congress in 1977. The Government's argument, at base, is that when Congress added the (A)(ii) provision containing an express limitation to criminal use, but did not add a similar limitation to (A)(i), it must have intended that no criminal-use limitation be applied to (A)(i) disclosure. The legislative history, although of less than perfect clarity, leads to the contrary conclusion. It appears instead that when Congress included the criminal-use limitation in the new (A)(ii), it was merely making explicit what it believed to be already implicit in the existing (A)(i) language.

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[20] See also *United States* v. *Mara*, 410 U. S. 19, 45–46 (1973) (MARSHALL, J., dissenting).

Rule 6(e), as it stood from 1946 to 1977, contained no provision for access to grand jury materials by nonattorneys[21] assisting Government attorneys. The only provision for automatic access was one substantially the same as the language presently in (A)(i): "Disclosure . . . may be made to . . . the attorney[s] for the government for use in the performance of [their] dut[ies]." This became something of a problem in practice, because Justice Department attorneys found that they often needed active assistance from outside personnel—not only investigators from the Federal Bureau of Investigation, IRS, and other law enforcement agencies, but also accountants, handwriting experts, and other persons with special skills. Hence, despite the seemingly clear prohibition of the Rule, it became common in some Districts for nonattorneys to be shown grand jury materials. This practice sparked some controversy and litigation.[22]

Accordingly, when in 1976 this Court transmitted to the Congress several proposed amendments to the Federal Rules of Criminal Procedure, 425 U. S. 1159, a proposal was included to add one sentence to Rule 6(e), immediately following the provision for disclosure to attorneys for the Government:

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[21] Although, for convenience, we use the term "nonattorneys" to describe the "other government personnel" referred to in (A)(ii), the provisions of (A)(ii) apply as well to attorneys for Government agencies outside the Justice Department, unless they are specially retained under 28 U. S. C. § 515 or § 543.

[22] See, *e. g.*, *J. R. Simplot Co.* v. *United States District Court*, 77-1 USTC ¶ 9416 (CA9 1976), withdrawn as moot, 77-2 USTC ¶ 9511 (1977), reprinted in House Hearings 249; *Robert Hawthorne, Inc.* v. *Director of Internal Revenue Service*, 406 F. Supp. 1098 (ED Pa. 1975); *In re Grand Jury Investigation of William H. Pflaumer & Sons, Inc.*, 53 F. R. D. 464 (ED Pa. 1971).

> "For purposes of [Rule 6(e)], 'attorneys for the government' includes those enumerated in Rule 54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties." 425 U. S., at 1161.

The accompanying Notes of the Advisory Committee on Rules, 18 U. S. C. App., p. 1024 (1976 ed., Supp. V), explained that the amendment was "designed to facilitate an increasing need, on the part of government attorneys, to make use of outside expertise in complex litigation." *Ibid.* The Committee noted, however, that under its proposal, disclosure to nonattorneys would be "subject to the qualification that the matters disclosed be used *only for the purposes of the grand jury investigation.*" *Id.*, at 1025 (emphasis added). Yet there was no express language in the proposed Rule clearly imposing this criminal-use limitation; the only limitation on use of grand jury materials was the double reference to "the performance of [Government attorneys'] duties." It appears, then, that the Advisory Committee took that phrase to mean that use of grand jury materials was limited to criminal matters, absent a court order allowing civil use—a construction that would apply equally to Justice Department attorneys and their nonattorney assistants.

The proposed amendment to Rule 6(e) met a mixed reception in Congress. Congress first acted to postpone the effective date of the amendment to Rule 6(e) so that it might study the proposal.[23] The House, after hearings, voted to disapprove the amendment. Members of the responsible Subcommittee stated that they were in general sympathy with the purpose of the proposal, but that they were concerned that it was not sufficiently clear to protect adequately against use of grand jury materials for improper purposes by Government personnel. They were unable to agree on a substitute draft.[24]

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[23] 90 Stat. 822.

The Senate Judiciary Committee was more hospitable to the original proposal. After consultation with House Members,[25] however, the Committee undertook to redraft Rule 6(e) to accommodate both the purpose of the proposed amendment and the concerns of the House.[26] The result was Rule 6(e) in substantially its present form, passed by both Houses without significant opposition.[27]

Congressional criticism of the proposed amendment focused on two problems: disclosure of grand jury materials to agencies outside the Department of Justice, and use of grand jury materials for non-grand-jury purposes. The two were closely related, however; the primary objection to granting access to employees of outside agencies, such as the IRS, was a concern that they would use the information to pursue civil investigations or unrelated criminal matters, in derogation of the limitations on their usual avenues of investigation.[28] Little attention was paid to the prospect that other attorneys within the Justice Department, as much as other agencies, might use grand jury materials for civil purposes—presumably because the proposed amendment did not purport to alter the text governing access by Justice Department attorneys in any way. The only participant to address that aspect of the problem directly was Acting Deputy Attorney General Richard Thornburgh, testifying on behalf of the Justice Department at the House Hearings. Thornburgh acknowledged that it would be a bad idea to allow agency personnel to use grand jury materials for civil purposes, but he contended that neither the proposal as drafted nor current practice would allow such use. Materials, he said, should be available to "every legitimate member of [the] team" conducting the criminal investigation, including "the assistant U. S. attorney who is probably conducting the investigation."[29] He continued:

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[24] H. R. Rep. No. 95–195, pp. 4–5 (1977); *id.*, at 13–15 (additional views of Rep. Wiggins); 123 Cong. Rec. 11109 (1977) (remarks of Rep. Mann); *id.*, at 11110 (remarks of Rep. Wiggins); *id.*, at 11111 (remarks of Rep. Holtzman); *id.*, at 25195–25196 (remarks of Rep. Wiggins).

[25] See *id.*, at 25194 (remarks of Rep. Mann).

[26] S. Rep. No. 95–354, pp. 1–2, 5–8 (1977).

[27] Rule 6(e) was further amended in other respects in 1979 and again this Term (the latter amendment to take effect on August 1, 1983). Neither of these amendments has any bearing on this case, except as discussed in n. 7, *supra*. The present Rule 6(e)(3) was designated as Rule 6(e)(2) in the version proposed by the Senate and enacted in 1977.

[28] The House Report recommending disapproval, for example, stated:

"It was feared that the proposed change would allow Government agency personnel to obtain grand jury information which they could later use in connection with an unrelated civil or criminal case. This would enable those agencies to circumvent statutes that specifically circumscribe the investigative procedure otherwise available to them." H. R. Rep. No. 95–195, p. 4 (1977) (footnote omitted).

> "Now, when you begin to move beyond the parameters of that particular investigation, we get to the point that you and I both have some trouble with. The cleanest example I can think of where a 6(e) order [*i. e.*, a court order under what is now (C)(i)] is clearly required is where a criminal fraud investigation before a grand jury fails to produce enough legally admissible evidence to prove beyond a reasonable doubt that criminal fraud ensued.
>
> *"It would be the practice of the Department at that time to seek a 6(e) order from the court in order that that evidence could be made available for whatever civil consequences might ensue.*
>
> "If there were fraud against the Government[,] for example, there would be a civil right of the Government to recover penalties with respect to the fraud that took place."[30]

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[29] House Hearings 67.

[30] *Ibid.* (emphasis added).

The dissent asserts that Thornburgh's testimony refers to use of grand jury materials by lawyers for outside agencies, not by attorneys in the Jus-

The rest of the legislative history is consistent with this view that *no* disclosure of grand jury materials for civil use should be permitted without a court order.[31] Congress' expressions of concern about civil use of grand jury materials did not distinguish in principle between such use by outside agencies and by the Department; rather, the key distinction was between disclosure for criminal use, as to which access should be automatic, and for civil use, as to which a court order should be required.[32] The Senate Report, for example, explained its redraft thus:

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tice Department. *Post*, at 461, and n. 8. This assertion is inexplicable, since Thornburgh was speaking of a suit on behalf of the Government for civil fraud—in other words, to the precise situation presented in the present case.

The dissent also refers to various other indications, as it takes them to be, of standard Department practice as it existed at various times considerably before 1977. As the dissent itself notes, however, *post*, at 456–457, "standard practice" was somewhat inconsistent with itself, and in many instances resulted in use of grand jury materials that clearly would now be considered illegal under Rule 6(e). Indeed, in the *Procter & Gamble* case, the Government argued in the District Court that there was nothing improper in its practice of using a grand jury deliberately for the purpose of advancing a civil investigation, *United States* v. *Procter & Gamble Co.*, 19 F. R. D. 122, 124, and n. 7 (NJ 1956)—a proposition we squarely rejected in our decision, 356 U. S., at 683–684. In any event, we think the most reliable evidence of what Congress in 1977 understood to be standard Department practice was what Thornburgh, the Department's official representative at the hearings, stated it to be.

[31] Admittedly, there were one or two suggestions in the course of consideration that there might be some distinction between the Justice Department and all other agencies, based on a district court's greater ability to exercise supervision over a United States Attorney. See, *e. g.*, House Hearings 47–54 (statement of Judge Becker); see also *Robert Hawthorne, Inc.* v. *Director of Internal Revenue Service*, 406 F. Supp. 1098 (ED Pa. 1976) (Becker, J.). This suggested solution did not prevail, however. Indeed, the Senate's compromise redraft was intended to avoid imposing a supervisory role on the district court with regard to criminal use of grand jury materials by prosecutors or their assistants. See S. Rep. No. 95–354, pp. 7, n. 12, 8 (1977).

[32] The American Bar Association's Section of Criminal Justice has since proposed to amend (A)(i) by adding the same express limitation to criminal

> "The Rule as redrafted is designed to accommodate the belief on the one hand that Federal prosecutors should be able, without the time-consuming requirement of prior judicial interposition, to make such d[illegible]sures of grand jury information to other government personnel as they deem necessary to facilitate the performance of their duties relating to criminal law enforcement. On the other hand, the Rule seeks to allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Federal laws by (1) providing a clear prohibition, subject to the penalty of contempt and (2) requiring that a court order under paragraph (C) be obtained to authorize such a disclosure. There is, however, no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes. On the contrary, there is no reason why such use is improper, assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation. Accordingly, the Committee believes and intends that the basis for a court's refusal to issue an order under paragraph (C) to enable the government to disclose grand jury information in a non-criminal proceeding should be no more restrictive than is the case today under prevailing court decisions." S. Rep. No. 95–354, p. 8 (1977) (footnote omitted).

This paragraph reflects the distinction the Senate Committee had in mind: "Federal prosecutors" are given a free hand con-

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matters that now exists in (A)(ii). According to the ABA, the amendment would "make explicit the clear intention of the drafters of the 1977 amendment to the rule . . . [to] ensur[e] that the grand jury is not used, *by anyone*, as an uncontrolled means of enforcing civil laws." ABA Grand Jury Policy and Model Act 5, 15 (2d ed. 1982) (emphasis in original). See also House Hearings 124. The Advisory Committee on Criminal Rules of the Judicial Conference tentatively proposed to adopt the ABA's suggestion, but it deferred consideration of the matter pending our decision in this case. Letter of transmittal from William E. Foley to this Court, October 1, 1982, attachment.

cerning use of grand jury materials, at least pursuant to their "duties relating to criminal law enforcement"; but disclosure of "grand jury-developed evidence for civil law enforcement purposes" requires a (C)(i) court order.[33]

We conclude, then, that Congress did not intend that "attorneys for the government" should be permitted free civil use of grand jury materials. Congress was strongly concerned with assuring that prosecutors would not be free to turn over grand jury materials to others in the Government for civil uses without court supervision, and that statutory limits on civil discovery not be subverted—concerns that apply to civil use by attorneys within the Justice Department as fully as to similar use by persons in other Government agencies. Both the Advisory Committee Notes and the testimony of the Justice Department's own representative suggested that even under the old Rule such disclosure for civil use would not have been permissible; indeed, the latter gave a hypothetical illustration closely similar to this very case. The express addition of a "criminal-use" limitation in (A)(ii) appears to have been prompted by an abundance of caution, owing to Congress' special concern that nonattorneys were the ones most likely to pose a danger of unauthorized use.

IV

Since we conclude that the Government must obtain a (C)(i) court order to secure the disclosure it seeks in this case,[34] we must consider what standard should govern the issuance of such an order.

Rule 6(e)(3)(C)(i) simply authorizes a court to order disclosure "preliminarily to or in connection with a judicial proceeding." Neither the text of the Rule nor the accompanying commentary describes any substantive standard governing issuance of such orders. We have consistently construed the Rule, however, to require a strong showing of particularized need for grand jury materials before any disclosure will be permitted. *Abbott*, 460 U. S., at 566–567; *Douglas Oil*, 441 U. S., at 217–224; *Dennis*, 384 U. S., at 869–870; *Pittsburgh Plate Glass Co.*, 360 U. S., at 398–401; *Procter & Gamble*, 356 U. S., at 681–683. We described the standard in detail in *Douglas Oil:*

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[33] Cf. n. 15, *supra*.

[34] The Government concedes that in any event it would need a (C)(i) order before it could show these materials to the Defense Department experts whose assistance it desires.

> "Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed. . . .
>
> "It is clear from *Procter & Gamble* and *Dennis* that disclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy, and that the burden of demonstrating this balance rests upon the private party seeking disclosure. It is equally clear that as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification. In sum, . . . the court's duty in a case of this kind is to weigh carefully the competing interests in light of the relevant circumstances and the standards announced by this Court. And if disclosure is ordered, the court may include protective limitations on the use of the disclosed material . . . ." 441 U. S., at 222–223 (citations omitted).

The Government points out that *Douglas Oil* and its forerunners all involved private parties seeking access to grand jury materials. It contends that the *Douglas Oil* standard ought not be applied when Government officials seek access "in furtherance of their responsibility to protect the public weal." Brief for United States 43. Earlier this Term, however, we rejected a similar argument in *Abbott, supra*. At issue there was an antitrust statute requiring the United States Attorney General to turn over to state attorneys general certain investigative files and materials, "to the extent permitted by law." 15 U. S. C. § 15f(b). We assumed that grand jury records are among the materials to be disclosed under the statute, 460 U. S., at 566, n. 10. We held nevertheless that the particularized-need standard applies to disclosure to state attorneys general, and that Congress did not intend to legislate to the contrary when it enacted the statute in question. *Id.*, at 566–568, and nn. 14–16.

Our conclusion that *Douglas Oil* governs disclosure to public parties as well as private ones is bolstered by the legislative history of the 1977 amendment of Rule 6(e), *supra*, Part III–B. That amendment was not directed at the provision for court-ordered disclosure (now (C)(i)), which remained textually unchanged. The Senate Committee that drafted the present Rule noted the importance of that provision, however, pointing out that it would continue to govern disclosure to Government parties for civil use under prevailing court interpretations.[35] Moreover, if we were to agree with the Government that disclosure is permissible if the grand jury materials are "relevant to matters within the duties of the attorneys for the government," Brief for United States 13, a (C)(i) court order would be a virtual rubber-stamp for the Government's assertion that it desires disclosure. Thus, under the Government's argument, it would get under subparagraph (C)(i) precisely what Congress in 1977 intended to deny it under subparagraphs (A) and (B)—unlimited and unregulated access to grand jury materials for civil use.

The Government further argues that "disclosure of grand jury materials to government attorneys typically implicates few, if any, of the concerns that underlie the policy of grand jury secrecy." Brief for United States 45. The contention is overstated, see *supra*, at 431–434, but it has some validity. Nothing in *Douglas Oil*, however, requires a district court to pretend that there are no differences between governmental bodies and private parties. The *Douglas Oil* standard is a highly flexible one, adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than in others. Hence, although *Abbott* and the legislative history foreclose any special dispensation from the *Douglas Oil* standard for Government agencies, the standard itself accommodates any relevant considerations, peculiar to Government movants, that weigh for or against disclosure in a given case For example, a district court might reasonably consider that disclosure to Justice Department attorneys poses less risk of further leakage or improper use than would disclosure to private parties or the general public. Similarly, we are informed that it is the usual policy of the Justice Department not to seek civil use of grand jury materials until the criminal aspect of the matter is closed. Cf. *Douglas Oil, supra*, at 222–223. And "under the particularized-need standard, the district court may weigh the public interest, if any, served by disclosure to a governmental body . . . ." *Abbott, supra*, at 567–568, n. 15. On the other hand, for example, in weighing the need for disclosure, the court could take into account any alternative discovery tools available by statute or regulation to the agency seeking disclosure.

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[35] S. Rep. No. 95–354, p. 8, and n. 13 (1977). See also House Hearings 92–93.

In this case, the District Court asserted that it had found particularized need for disclosure, but its explanation of that conclusion amounted to little more than its statement that the grand jury materials sought are rationally related to the civil fraud suit to be brought by the Civil Division. App. to Pet. for Cert. 22a–23a. The Court of Appeals correctly held that this was insufficient under *Douglas Oil* and remanded for reconsideration under the proper legal standard. 642 F. 2d, at 1190–1192.[36]

V

The Court of Appeals correctly held that disclosure to Government attorneys and their assistants for use in a civil suit is permissible only with a court order under Rule 6(e)(3)(C)(i), and that the District Court did not apply correctly the particularized-need standard for issuance of such an order. Accordingly, the judgment of the Court of Appeals is

Affirmed.

CHIEF JUSTICE BURGER, with whom JUSTICE POWELL, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

The Court today holds that attorneys within the Department of Justice who are not assigned to the grand jury investigation or prosecution must seek a court order on a showing of particularized need in order to obtain access, for the purpose of preparing a civil suit, to grand jury materials already in the Government's possession. In my view, this holding is contrary not only to the clear language but also to the history of Rule 6(e)(3)(A)(i) of the Federal Rules of Criminal Procedure. In addition, the Court's decision reflects an erroneous assessment of the relevant policies, and provides the courts and the Department of Justice with precious little guidance in an area of great importance. I believe that, when a grand jury is validly convened and conducted on the request of the Government for criminal investigatory purposes, it is proper and entirely consistent with the Federal Rules of Criminal Procedure for any attorney in the Department of Justice to have access to grand jury materials in pursuing inquiry into civil claims involving the same or related matters. I therefore dissent.

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[36] The Court of Appeals properly directed that the District Court should consider respondents' allegations of grand jury misuse. 642 F. 2d, at 1192. The District Court had already stated as an aside that it was not persuaded that any such misuse had taken place, but it expressly declined to rule on the matter formally or to state the grounds for its view. App. to Pet. for Cert. 24a. We also leave it to the District Court to consider the significance, if any, of the findings on respondents' allegations entered in a related litigation. See Brief for United States 8–9, n. 8.

I

Rule 6(e)(3)(A)(i) (hereinafter (A)(i)) is straightforward and clear. It provides:

> "(A) Disclosure . . . of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—
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> "(i) an attorney for the government for use in the performance of such attorney's duty."

Notwithstanding the clarity of the Rule, neither the Court of Appeals for the Ninth Circuit nor the majority of this Court has seen fit to honor its plain language.

As nearly as we can understand, the Court of Appeals' opinion holds that attorneys within the Department of Justice assigned to civil matters are not entitled to routine, automatic disclosure of grand jury materials under (A)(i). In reaching this conclusion, the Court of Appeals appears to have drawn a sharp line between attorneys on the third floor of the Department of Justice assigned to civil litigation, and those on the first floor assigned to criminal cases. Such a reading is contrary to the Rule, to the intent of Congress, and to common sense.

Subparagraph (A)(i) authorizes automatic disclosure to any "attorney for the government" for use by that attorney in the performance of his assigned duty. The term "attorney for the government" is in turn defined in Rule 54(c) to include "an authorized assistant of the Attorney General."[1] By

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[1] Throughout this opinion, the term "Government attorneys" is used to refer to those attorneys specified in Rule 54(c), which provides:

"'Attorney for the government' means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an austatute, every Justice Department attorney, wherever assigned in the Department, is an "authorized assistant" of the Attorney General. 28 U. S. C. §§ 510, 515–517. It thus is not surprising to find that the Court's opinion recognizes that "attorneys for the Civil Division of the Justice Department are within the class of 'attorneys for the government' to whom (A)(i) allows disclosure *without* a court order," *ante*, at 427–428 (emphasis added). That should be the end of the matter.

Today we find that it does not end the matter. After properly acknowledging that the term "attorney for the government" embraces Civil Division attorneys, the Court turns to the next clause in the Rule and strains that clause virtually beyond recognition.

Subparagraph (A)(i) authorizes disclosure to a Government attorney "for use in the performance of *such attorney's duty*." At one time all attorneys under the Attorney General were simply his aides. As with private law firms, a time came when it was more efficient to segregate attorneys by their specialized functions into separate Divisions within the Justice Department. An attorney in the Civil Division will naturally deal primarily with civil matters. Once it is recognized that (A)(i) authorizes disclosure to attorneys within the Civil Division, therefore, I would think it beyond question that they, as "assistants to the Attorney General," may use the disclosed materials in performing their normal duties, which of course include the civil fraud action at issue here.

The Court concludes otherwise, however, apparently in the belief that the only duty contemplated by (A)(i) is the conduct of *criminal* cases![2] Nothing in (A)(i) remotely

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thorized assistant of a United States Attorney, [and, in certain cases, the Attorneys General of Guam and the Northern Mariana Islands]."

The term does not include attorneys for agencies outside the Department of Justice.

[2] As discussed below, see *infra*, at 473–474, the Court's rationale is unclear. At times, the Court seems to be basing its decision upon a distinction between use of grand jury materials in civil and criminal cases. See,

suggests such a curious result. In fact, a comparison of (A)(i) with the subparagraph which directly follows it, (e)(3)(A)(ii) (hereinafter (A)(ii)), reveals precisely the opposite. Subparagraph (A)(ii), which governs disclosure of grand jury materials to personnel assisting Government attorneys, allows disclosure to such nonattorneys only when "deemed necessary . . . to assist an attorney for the government in the performance of such attorney's duty *to enforce federal criminal law.*" Nonattorneys therefore are entitled to automatic access only in certain *criminal* cases. In contrast, (A)(i) imposes no such limitation upon disclosure to Government *attorneys*—as distinguished from *non*attorney personnel. Under (A)(i), Government attorneys are entitled to grand jury materials for use in performing the full range of their duties. This reading of the Rule is not simply "plausible," as the Court concedes, see *ante*, at 435; in my view, it is compelling.

In seeking to avoid this straightforward interpretation, the Court places considerable reliance on the fact that Rule 6(e) contained no provision similar to (A)(ii) until 1977, whereas the substance of (A)(i) has appeared in Rule (6)(e) since its inception in 1946. The Court suggests that Congress, in amending the Rule in 1977, sought to grant support personnel the same range of access to grand jury materials as the attorneys they are assisting. In the view of the Court, the language of (A)(ii) simply "mak[es] explicit what [Congress] believed to be already implicit in the existing (A)(i) language." *Ante*, at 436.

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e. g., ante, at 435–443. At other times, however, the Court implies that its rule prohibits only disclosure to those Government lawyers *outside* the "prosecution team," and thus presumably allows any attorney who properly has participated in the criminal investigation or prosecution to use the grand jury materials to which he has had access for any purpose, criminal or civil. See, *e. g., ante*, at 430–431, 431, n. 15, 432, n. 16. Of course, the Attorney General may assign to a criminal case any lawyer under his jurisdiction.

This argument suffers from three major flaws. First, it rests on the assumptions that Government attorneys pursuing civil matters were not entitled to grand jury materials prior to 1977, and that Congress based its 1977 amendments upon such an understanding. Those assumptions are inaccurate, as I will demonstrate.

Second, the Court appears to believe that Government attorneys pursuing civil matters are in essentially the same position as nonattorney support personnel with respect to both their need for grand jury materials and their likelihood to violate grand jury secrecy. This is clearly not the case, and Congress took the obvious differences into account in 1977 when it chose to adopt different standards for disclosure to Government attorneys, on the one hand, and to support personnel, on the other.

Finally, the Court overlooks the reality that in 1977 Congress revised *all* of Rule 6(e)—including what is now (A)(i). Under those circumstances, it hardly seems likely that Congress was ignorant of the fact that the standards applicable to Government attorneys in (A)(i) differ from those for nonattorney support personnel in (A)(ii).

II

The Court appears to believe that there is something in the history of Rule 6(e) that gives it license to ignore the Rule's plain language. I disagree. The history of the drafting of a rule can justify a court in deviating from clear language only if that history leaves no question as to the meaning of the rule. See, *e. g.*, *Bread Political Action Committee* v. *FEC*, 455 U. S. 577, 580–581 (1982); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). Even the partial history provided by the Court is at best ambiguous and wholly insufficient to overcome the plain language of the Rule. And elements of the Rule's history that are ignored by the Court make clear that (A)(i) means just what it says, *i. e.*, "government attorneys" are entitled to grand jury materials for the full range of their assigned duties, whatever may be their responsibilities.

A

The direct predecessor of (A)(i) was adopted in 1946. As initially promulgated, Rule 6(e) provided, in relevant part:

> "Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the *attorneys for the government* for use in the performance of their duties." (Emphasis added.)

In interpreting this Rule, the Court places almost total reliance upon the following comment in the Advisory Committee Notes:

> "Government attorneys are entitled to disclosure of grand jury proceedings . . . inasmuch as they may be present in the grand jury room during the presentation of evidence. The rule continues this practice." Advisory Committee Notes, 18 U. S. C. App., p. 1411.

Even the Court concedes, however, that Rule 6(e) was never intended to limit disclosure to only those Government attorneys who were actually present in the grand jury room. See *ante*, at 429, n. 11. Plainly, for example, grand jury materials may be disclosed to superiors within the Justice Department. See, *e. g.*, *United States* v. *United States District Court*, 238 F. 2d 713 (CA4 1956), cert. denied *sub nom. Valley Bell Dairy Co.* v. *United States*, 352 U. S. 981 (1957).

Thus, the curious line announced by the Court today appears nowhere in either the Advisory Committee Notes or the Rule itself. Further historical examination reveals, moreover, that the Rule was understood by its drafters to permit disclosure to attorneys throughout the Department of Justice, and that the Rule consistently has been applied in just such a manner ever since it was adopted.

B

The historical setting and the records of the Advisory Committee on Criminal Rules reveal that the original draftsmen of Rule 6(e) intended the Rule to authorize automatic disclosure to attorneys throughout the Department of Justice. In the late 1930's and early 1940's, grand jury transcripts were regarded as the property of the Government. See Lewin, The Conduct of Grand Jury Proceedings in Antitrust Cases, 7 Law & Contemp. Prob. 112, 121, 125 (1940). It was recognized that the grand jury is a criminal investigatory body that may not be used as a mere discovery tool, see, *e. g., In re National Window Glass Workers*, 287 F. 219 (ND Ohio 1922). But when the grand jury investigation was brought in good faith for purposes of possible criminal prosecution, grand jury transcripts and materials were on several reported occasions made available to other Government attorneys or other governmental units for use in pursuing related civil litigation and for other purposes. See, *e. g., In re Grand Jury Proceedings*, 4 F. Supp. 283 (ED Pa. 1933) (minutes of grand jury that led to indictment for violation of prohibition laws disclosed for use in subsequent action to revoke beer permit); *In re Bendix Aviation Corp.*, 58 F. Supp. 953 (SDNY 1945) (grand jury materials used by Department of Justice in preparing civil antitrust action).[3]

Nevertheless, when the Federal Rules of Criminal Procedure were first proposed, no provision was included for disclosure of grand jury materials to Government attorneys. In fact, neither the first nor the second draft of the Federal

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[3] See also, *e. g., In re Crain*, 139 Misc. 799, 250 N. Y. S. 249 (Gen. Sess. 1931) (minutes disclosed to Police Commissioner for investigation of public corruption); *In re Attorney General of United States*, 160 Misc. 533, 291 N. Y. S. 5 (Cty. Ct. 1936) (state grand jury minutes disclosed for use by Attorney General of the United States); Morse, A Survey of the Grand Jury System, Part II, 10 Ore. L. Rev. 295, 336–337, n. 200 (1931) (same). Cf. *In re Texas Co.*, 27 F. Supp. 847, 851 (ED Ill. 1939) (upholding grand jury subpoenas, even assuming that the evidence might help the Government in its prosecution of other pending indictments).

Rules of Criminal Procedure contained any provision relating to the grand jury. Rule 80 of the third draft concerned the grand jury; and by the seventh draft (also known as the "First Preliminary Draft"), that Rule (then numbered Rule 7(e)) had come much closer to its final form. The Rule still required a court order for any disclosure, however. See generally Orfield, The Federal Grand Jury, 22 F. R. D. 343, 346–357 (1959) (hereinafter Orfield).

There were numerous objections to the narrowness of this Rule. Assistant Attorney General Wendell Berge remarked:

> "It . . . seems to me that the rule, read literally, has the effect of preventing a United States Attorney, or other authorized government attorney, from discussing developments before the grand jury with the Attorney General, an Assistant Attorney General, or other authorized Department of Justice officials. I cannot believe that such a result was intended and I think that appropriate exception ought to be made in the rule to cover this situation." 2 Advisory Committee on Federal Rules of Criminal Procedure, Preliminary Draft: Comments, Recommendations and Suggestions Concerning the Proposed Federal Rules of Criminal Procedure 355 (1943).

Judge Paul J. McCormick of the Southern District of California raised the same objection:

> "As a matter of common practice the United States Attorney uses the grand jury transcript rather freely with investigators and attorneys for the various governmental agencies. . . . If the rule contemplates a restriction on the United States Attorney's use of the transcript, I believe that he should be excepted from the provision requiring the permission of the court." *Ibid.*

Similarly, Robert M. Hitchcock expressed concern that the Rule as then drafted would prevent a prosecuting attorney from discussing the evidence before a grand jury "with his superior or with representatives of the Department of Justice," 1 *id.*, at 60. Similar views were expressed by others. See 1 *id.*, at 59 (remarks of United States Attorney Joseph T. Votava); 2 *id.*, at 354 (summary of suggestions of federal judges of Michigan); 2 *id.*, at 355 (letter of United States Attorney Joseph F. Deeb).

The next draft (Second Preliminary Draft) reflected these comments; the first sentence of the Rule was amended to its final form, authorizing disclosure to "the attorneys for the government for use in the performance of their duties." The scope of the amended Rule did not go unopposed. Judge S. H. Sibley of the Court of Appeals for the Fifth Circuit proposed deleting the entire first sentence of the Rule, and revising the Rule to require a court order for any disclosure, including disclosure by the attorneys who had been in the grand jury room to other Justice Department attorneys. Judge Sibley explained his proposed change as follows:

> "The change . . . is due to a belief that secrecy of the proceedings before the Grand Jury ought to be maintained except when otherwise ordered by the judge. A general rule permitting disclosures to attorneys for the Government is thought unwise, apparently having no check except the desire of the particular Government official who undertakes to get or make the disclosure. Embarrassing leaks might easily occur under so broad a rule applying to so many persons." 4 *id.*, at 13 (1944).

There can be no doubt that the draftsmen realized the need for precision in the language of the Rules; and in light of the numerous criticisms of the prior version of the Rule and Judge Sibley's comments on the amended version, there also can be little question that the draftsmen were fully aware of the breadth of the Rule they were proposing. If they had intended the Rule to have the crabbed meaning now advanced by the Court, they surely would have amended the first sentence of the Rule. Yet they left that sentence as it was, while making other changes in the Rule. I have no doubt that, in doing so, they realized and intended that the Rule would allow disclosure of grand jury materials to all "government attorneys" for use in performing their assigned duties.[4]

Lester Orfield, one of the members of the Advisory Committee, later observed:

> "[I]n comparison with the right of the defendant and of third parties, the right of the government to see and use the grand jury minutes is *incomparably the greatest.* And the government obtains discovery without first having to make a motion for it. The first sentence of Rule 6(e) provides for disclosure to the government for use in the performance of duties and says nothing about court action." Orfield 451 (emphasis added).

In view of the background and history of the drafting of the 1946 Rule, I do not believe there can be any doubt that Orfield and the other draftsmen were aware of the breadth of the provision for disclosure to Government attorneys.

C

The subsequent application of Rule 6(e) further confirms the conclusion that it authorizes disclosure to Government attorneys for use in the full range of the duties assigned to them by the Attorney General. Throughout the 1940's and 1950's, those conducting grand jury investigations regularly referred matters to other attorneys in the Department of Justice if civil litigation proved desirable, and, in accordance with Rule 6(e), grand jury transcripts and materials were made available to the attorneys pursuing the civil suits. This practice appears to have been most frequent in the antitrust area. See, *e. g., United States* v. *Procter & Gamble Co.*, 19 F. R. D. 122 (NJ 1956), rev'd on other grounds, 356 U. S. 677 (1958); Hollabaugh, Development of an Antitrust Case, 4 A. B. A. Antitrust Section 14, 18–22 (1954). In addition, civil fraud suits of the sort at issue here often were referred to Civil Division attorneys after grand jury investigations revealed that criminal prosecution was inappropriate or that dual civil and criminal proceedings were warranted. See, *e. g., United States* v. *Ben Grunstein & Sons Co.*, 137 F. Supp. 197 (NJ 1955). See also *United States* v. *General Motors Corp.*, 15 F. R. D. 486 (Del. 1954) (civil damages action under Elkins Act).

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[4] The Court somehow reads the above history as referring only to disclosure for prosecutorial purposes. See *ante*, at 429, n. 11. Those who commented on the various drafts of the original Rule spoke of the need for disclosure to other "Department of Justice officials," "attorneys for the various governmental agencies," and "representatives of the Department of Justice." Much as the Court may wish otherwise, they did not refer to disclosure only to what the Court characterizes as the "prosecution team."

On occasion, the use of grand jury materials in civil actions exceeded the bounds of Rule 6(e). Agency attorneys, who are not within the definition of "attorneys for the government" contained in Rule 54(c), were at times allowed access to grand jury materials for their own purposes without first obtaining a court order, as required by Rule 6(e), see *In re April 1956 Term Grand Jury*, 239 F. 2d 263 (CA7 1956); and grand juries were on occasion convened for the sole purpose of obtaining evidence for civil litigation, see Report of The Attorney General's National Committee to Study the Antitrust Laws 344–345 (1955); Chadwell, Antitrust Administration and Enforcement, 53 Mich. L. Rev. 1133, 1134–1135 (1955). Throughout this period, however, courts regularly recognized that Rule 6(e) authorized Government attorneys to use grand jury materials in subsequent civil litigation, provided the grand jury itself had been convened and conducted for valid criminal investigatory purposes. See, *e. g., In re Petroleum Industry Investigation*, 152 F. Supp. 646 (ED Va. 1957); *United States* v. *Procter & Gamble Co., supra; Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 194 F. Supp. 763 (Mass. 1958); *United States* v. *Ben Grunstein & Sons Co., supra; United States* v. *General Motors Corp.*, *supra.* Cf. *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793 (1949) (in civil antitrust case Government was entitled to production of documents previously subpoenaed by grand jury but returned to owners when the indictment was dismissed).

The leading case on this point is this Court's decision in *United States* v. *Procter & Gamble Co.*, 356 U. S. 677 (1958). There, the Government had convened and conducted a grand jury investigation of possible antitrust violations in the soap industry. Counsel for the Government had stated in an affidavit that the investigation served dual purposes: first, to determine whether there were violations of the antitrust laws, and, second, to determine "what action should be taken to enforce those laws through criminal proceedings, *civil proceedings or both.*" *United States* v. *Procter & Gamble Co.*, 14 F. R. D. 230, 233 (NJ 1953) (emphasis added). No indictment was returned, but soon after the conclusion of the grand jury proceeding the Government filed a civil suit. In preparing that suit, the Government used the grand jury transcript without seeking a court order, and defendants also sought access to the grand jury transcript. The District Court granted the defendants' motion, holding that defendants should be entitled to the same right of access to these materials as the Government. 19 F. R. D. 122 (1956). This Court reversed, ruling that the defendants had not made the requisite particularized showing of need for disclosure of the testimony. 356 U. S., at 682.

The validity of the Government's use of the grand jury transcript for civil purposes was not directly before the Court in *Procter & Gamble*, but since that use had played a central role in the District Court's analysis, this Court addressed the issue. In so doing the Court made clear that it regarded the Government's civil use of the materials as entirely proper:

> "[The District Court] seemed to have been influenced by the fact that the prosecution was using criminal procedures to elicit evidence in a civil case. If the prosecu-

> tion were using that device, it would be flouting the policy of the law. . . .
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> "*We cannot condemn the Government for any such practice in this case.* There is no finding that the grand jury proceeding was used as a short cut to goals otherwise barred or more difficult to reach. It is true that no indictment was returned in the present case. But that is no reflection on the integrity of the prosecution. For all we know, the trails that looked fresh at the start faded along the way. What seemed at the beginning to be a case with a criminal cast apparently took on a different character as the events and transactions were disclosed. *The fact that a criminal case failed does not mean that the evidence obtained could not be used in a civil case.*" *Id.*, at 683–684 (emphasis added).

Since this Court was aware that the Government was using grand jury materials to prepare its civil case without a court order, it is crystal clear that the Court approved of Government attorneys' use of grand jury transcripts and materials in pursuing civil cases, so long as the grand jury was validly convened and the inquiry conducted for criminal investigatory purposes, and not simply used as a substitute for civil discovery.[5] See also *United States* v. *Procter & Gamble Co.*, 180 F. Supp. 195 (NJ 1959) (after remand).

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[5] The Court today blandly ignores Justice Douglas' opinion for the Court in *Procter & Gamble*, and instead places great weight on Justice Whittaker's concurring opinion, 356 U. S., at 684–685. Justice Whittaker expressed concern that grand jury proceedings might be abused for civil investigative purposes, and stated that he "would adopt a rule" requiring both the Government and private parties to show particularized need before disclosure, *id.*, at 685. The majority seems to believe that Justice Whittaker was describing the state of existing law, and attributes the same view to the other Members of the Court in *Procter & Gamble*. See *ante*, at 434, n. 19. Examination of Justice Whittaker's actual language reveals, however, that he was simply expressing his personal views regarding the rule that he *would adopt* if he were making the rules. He was not describing existing law, as was Justice Douglas. It bears note, moreover, that

In 1961, the Office of Legal Counsel of the Department of Justice examined the Department's practice of using grand jury materials for civil litigation. Not surprisingly, that Office's conclusions echoed those the *Procter & Gamble* Court had reached three years earlier. In summarizing its conclusions, that Office's memorandum stated that "[when] grand jury evidence may be relevant in connection with, or may suggest the advisability of instituting, other criminal *or civil* proceedings by the Department of Justice[,] . . . disclosure may be made *without court order* . . . ." Memorandum from Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, to Byron R. White, Deputy Attorney General, p. 1 (Dec. 21, 1961) (emphasis added). The body of the report elaborated on this conclusion:

> "The decisions are quite clear that, in some situations at least, grand jury evidence may be used for purposes of civil trial. In *United States* v. *Procter & Gamble*, . . . the Supreme Court refused, in a civil antitrust case, to order wholesale discovery of grand jury testimony, stating that, absent any showing of bad faith on the government in subverting the grand jury process, the evidence obtained before the grand jury 'could . . . be used in a civil case.' . . . [A number of other] cases sanction the use by government attorneys of grand jury evidence for the purpose of preparing a civil case, provided the grand jury investigation was brought in good faith for purposes of possible criminal prosecution. . . .
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> ". . . I conclude that grand jury evidence may be used by Department of Justice attorneys in connection with other criminal and civil litigation conducted by the government, subject to the power of the courts to quash the grand jury subpoenas or enjoin the grand jury investiga-

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none of the other five Justices in the majority saw fit to join Justice Whittaker's concurring opinion. Nor did the three dissenting Justices suggest that Rule 6(e) barred the Government from using materials from validly convened grand juries in pursuing subsequent civil litigation.

> tion (and, in civil cases, to order full discovery to the other party) if they feel the grand jury proceeding is being subverted or abused." *Id.*, at 10–13 (citations and discussion of cases omitted).

Throughout the 1960's and 1970's, the Department of Justice adhered to this standard and continued to disclose grand jury materials to other attorneys without court order, for use in pursuing civil actions involving the same or related matters as those in the criminal investigation.[6] On several reported occasions, courts upheld this use of grand jury materials. See, *e. g.*, *United States* v. *General Electric Co.*, 209 F. Supp. 197, 198–202 (ED Pa. 1962); *Washington* v. *American Pipe & Constr. Co.*, 41 F. R. D. 59, 62 (WD Wash., Ore., Haw., ND Cal., SD Cal. 1966); *In re July 1973 Grand Jury*, 374 F. Supp. 1334, 1337 (ND Ill. 1973); *United States* v. *Wohl Shoe Co.*, 369 F. Supp. 386 (NM 1974). See generally Note, Administrative Agency Access to Grand Jury Materials, 75 Colum. L. Rev. 162, 166–169 (1975). Thus, when Congress reconsidered Rule 6(e) in 1977, it did so against a backdrop of more than 30 years of consistent Justice Department practice of using grand jury materials without court order in investigating and prosecuting civil actions.

D

The Court does not suggest that Congress sought to change the meaning of the provision allowing disclosure to Government attorneys when it amended Rule 6(e) in 1977, nor would such a suggestion be tenable. Although Congress slightly modified the language of that provision[7] and placed it in a separate subparagraph, (A)(i), there is no indication that Congress intended to alter the meaning of the provision. On the contrary, as Representative Mann stated in explaining the amendments to the Members of the House:

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[6] See, *e. g.*, U. S. Dept. of Justice, A Practical Handbook of Federal Grand Jury Procedure 58–60 (2d ed. 1968); United States Attorneys' Manual § 9–11.367 (Feb. 16, 1982); Friedman, Parallel Investigations: Interagency Sharing of Information and Freedom of Information Act Problems, reprinted in part in ABA, Parallel Grand Jury and Administrative Agency Investigations 816, 819 (1981).

> "[Subparagraph (A)(i)] continues a policy of present rule 6(e). Disclosure of grand jury information may be made to 'an attorney for the Government for use in the performance of such attorney's duty.' This language, which is similar to language presently in the rule, *is not intended to change any current practice.*" 123 Cong. Rec. 25194 (1977) (emphasis added).

See also, *e. g.*, S. Rep. No. 95–354, pp. 5–8 (1977).

The Court nevertheless asserts that implicit in Congress' understanding of Rule 6(e) in 1977 was the belief that Government attorneys were entitled to automatic access to grand jury materials only for criminal purposes. To support this position, the Court quotes at length from the Senate Report on the Rule, S. Rep. No. 95–354, *supra*, and from testimony by Acting Deputy Attorney General Richard Thornburgh, Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 95th Cong., 1st Sess., 67 (1977) (hereafter Hearings). Yet the primary focus of the 1977 hearings and amendment was on use of grand jury materials by agencies *outside the Department of Justice*, and both of the statements relied on by the Court concerned this *agency* use of grand jury materials.[8] In my view, two ambiguous statements in connection with a quite different issue are hardly a balance for the clear historical evidence of more than 30 prior years of routine access to grand jury materials by Department of Justice attorneys pursuing civil matters.

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[7] The 1977 amendments replaced the phrase "*the attorneys* for the government for use in the performance of *their duties*" with "*an attorney* for the government for use in the performance of *such attorney's duty*."

[8] Acting Deputy Attorney General Thornburgh's statement, for example, was in response to an inquiry by Representative Mann concerning "grand jury information being made available to *other* agencies," Hearings, at 66 (emphasis added). Representative Mann asked if Thornburgh had

Moreover, other statements in the 1977 legislative history—statements that are ignored by the Court—reveal that

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described existing practice accurately when he stated that "the amendment will not permit the Department of Justice to take advantage of or make disclosures *to investigative agents or experts* in order to aid *other Federal agencies* in conducting *their own* [civil or criminal] investigations." *Id.*, at 55 (prepared statement of Acting Deputy Attorney General Thornburgh) (emphasis added).

Naturally, Congress would have understood Mr. Thornburgh to be answering the question he had just been asked—about disclosure of grand jury materials to *other agencies*—and not to be expressing his views concerning use by the Justice Department itself. In reaching a different conclusion, the Court places great emphasis on Thornburgh's reference to "civil fraud" actions on behalf of the Government. Yet, contrary to the Court's assumption, civil fraud suits are not the exclusive province of any one division of the Department. Other divisions and outside agencies, including the Internal Revenue Service, see, *e. g.*, *United States* v. *LaSalle National Bank*, 437 U. S. 298, 308–310 (1978), regularly pursue civil fraud actions on behalf of the Government. In the portion of his testimony immediately following that quoted by the Court, Mr. Thornburgh went on to refer to disclosure to the IRS. In summarizing his answer, he stated:

"In all of those instances and any others that we could discuss hypothetically *with respect to agencies such as the SEC and others*, there is constantly on the part of the United States Attorney's Office and the Department of Justice an awareness of the compartmentalization of the matters that they are dealing with." Hearings, at 67 (emphasis added).

When one considers Mr. Thornburgh's testimony as a whole and in context, it scarcely seems likely that Congress would have based its understanding of Justice Department practice upon his single ambiguous reference to civil fraud actions. This is especially true, given that a survey of United States Attorneys and the Justice Department conducted by the House Judiciary Committee in connection with this very amendment had disclosed that existing practice was to disclose grand jury information *to other divisions of the Justice Department without court order*. See H. R. Rep. No. 95–195, p. 13 (1977) (additional views of Rep. Wiggins) (quoted *infra*, at 463–464).

Congress fully understood that (A)(i) grants attorneys within the Department of Justice automatic access to grand jury materials for the full range of their duties, including their responsibility over civil matters. When it first proposed an amendment to Rule 6(e) in 1977, the Advisory Committee on Rules emphasized the difference between "attorneys for the government" and other Government personnel, including employees of administrative agencies. See 18 U. S. C. App., pp. 1024–1025 (1976 ed., Supp. V). The Committee set forth the definition of "attorney for the government" contained in Rule 54(c), see n. 1, *supra*, and then quoted the following language from *In re Grand Jury Proceedings*, 309 F. 2d 440 (CA3 1962):

> "The term attorneys for the government is restrictive in its application . . . . If it had been intended that the attorneys *for the administrative agencies* were to have free access to matters occurring before a grand jury, the rule would have so provided." *Id.*, at 443 (emphasis added).

This quote—and the opinion in which it appears—clearly draws a distinction between "attorneys for the government," who were entitled to free access to grand jury materials, and attorneys for administrative agencies, who were not entitled to such automatic disclosure.

This understanding was shared not only by the Advisory Committee, but also by Congress itself. Representative Charles Wiggins, dissenting from the decision of the House Committee on the Judiciary to defer action on Rule 6(e) (a decision with which the Senate disagreed, and on which the Senate's view ultimately prevailed), gave the following Report regarding existing disclosure practices:

> "In the course of considering [the amendment to Rule 6(e)], U. S. Attorneys and the Justice Department were surveyed as to their perception of current practice regarding grand jury disclosures. Although the view was

> not strictly uniform, there was general agreement that disclosures at least to criminal investigative agents *and other divisions within the Justice Department* were permissible without court order." H. R. Rep. No. 95-195, p. 13 (1977) (additional views of Rep. Wiggins).

As noted above, Representative Mann informed the Members of the House that the amendment was "not intended to change any current practice" regarding disclosure of grand jury materials to attorneys within the Department of Justice. 123 Cong. Rec. 25194 (1977). In floor debate, Representative Holtzman expressed the view that "grand jury proceedings ought not to be disclosed to *other governmental agencies* without strict safeguards." *Id.*, at 11111. Her statement was representative of the view of the courts. This view was later echoed by Representative Wiggins. In explaining to Members of the House the Senate amendment that ultimately prevailed, he emphasized yet again the differing standards for *Government* attorneys and for *agency* attorneys and personnel:

> "There will come a time when a grand jury uncovers violations of *civil* laws, or State or local laws. It then becomes the duty of the attorney for the Government, *if he or some other attorney for the Government cannot act on that information*, to turn it over to the appropriate governmental agency so that such agency can do its duty. However, the attorney for the Government may do this only after successfully seeking an order of the court." *Id.*, at 25196 (emphasis added).

See also, *e. g.*, Hearings, at 47-54 (statement of Judge Becker).

These statements all reflect an awareness of the prevailing practice, under which attorneys throughout the Department of Justice were entitled to use grand jury materials in performing all their responsibilities, but could not turn the material over to *another agency* for that agency's use except by court order. To me, there can be no doubt that Congress understood that under Rule 6(e) all attorneys in the Department of Justice were authorized to use grand jury materials in the full range of their duties—including civil matters—and chose to leave that standard unchanged. This is in marked contrast to the treatment of assisting personnel, including personnel of other agencies, to whom automatic disclosure is permitted under (A)(ii) only for *criminal* purposes. History thus conclusively buttresses the plain language of the Rule, compelling the conclusion that Government attorneys, as defined in Rule 54(c), are entitled to grand jury materials in pursuing civil matters, regardless of whether they themselves were assigned to the grand jury investigation or prosecution.[9]

III

The Court relies heavily upon perceived policy considerations that the Court seems to think favor its approach. The language and the history of the Rule are so clear that reference to policy considerations should be wholly unnecessary. Congress, in adopting (A)(i), already has made the relevant policy choices. In any event, however, the Court has erred gravely in its assessment of the policy implications of the standard it sets forth and of the standard which I believe actually appears in (A)(i).

The Court asserts that disclosure for civil use would do "affirmative mischief" in three ways. See *ante*, at 431–434. First, it is argued that "disclosure to Government bodies raises much the same concerns that underlie the rule of secrecy in other contexts." *Ante*, at 432. Presumably, the

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[9] The Court seeks support for its reading of the Rule in a 1982 American Bar Association proposal to amend (A)(i). See *ante*, at 440–441, n. 32. I scarcely think that this Court need rely on an interpretation of the drafters' views supplied five years later by the ABA, when the actual legislative history is readily available. As the ABA recognized, the plain language of the Rule is contrary to the decision reached today. If the Rule is to be amended, as the ABA urged, that amendment should take place through the normal rules process, and not through a decision of this Court.

"concerns" to which the Court refers are those set forth in *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U. S. 211 (1979):

> "First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against the indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule." *Id.*, at 219.

In raising the specter of lost secrecy, the Court ignores the fact that normal Justice Department practice—which was followed in this case—calls for disclosing grand jury materials for civil use only *after* the grand jury proceeding and criminal investigation have been completed, see United States Attorneys' Manual § 9–11.367 (Feb. 16, 1982). That being the case, the secrecy concerns suggested by the Court lose much of their relevance; there is, for example, no risk that potential defendants may flee or try to influence grand jurors or witnesses.

Furthermore, attorneys for the Justice Department are officers of the court bound to high ethical standards. The Court itself recognizes that "disclosure to Justice Department attorneys poses less risk of further leakage or improper use than would disclosure to private parties or the general public," *ante*, at 445, and notes "Congress' special concern that nonattorneys were the ones most likely to pose a danger of unauthorized use," *ante*, at 442. The Court nevertheless appears to premise its analysis on the assumption that Government attorneys routinely will violate their duty to uphold grand jury secrecy, in accordance with the requirements of Rule 6(e). That Rule embodies a clear standard of secrecy, subject to a set of carefully delineated exceptions; and I, for one, am unwilling to accept this wholly unwarranted assumption on the part of the Court. Dissemination of grand jury materials beyond Justice Department attorneys will occur only if, upon examination, the materials are found to warrant a civil action by the United States, and then only upon receipt of a court order pursuant to Rule 6(e). At that point, any interest in secrecy would be clearly outweighed by the public interest in disclosure.

The Court next asserts that a blanket rule against access to grand jury materials for civil purposes is needed to prevent the possibility that the grand jury will be used improperly as a tool for civil discovery. I fully agree with the Court that use of grand jury proceedings for the purpose of obtaining evidence for a civil case is improper.[10] But the mere *potential* for such abuse does not justify this Court's precluding Department of Justice attorneys from reviewing grand jury materials in assessing and prosecuting civil actions in the vast majority of cases where the grand jury has been convened and conducted for valid criminal investigatory purposes. As the Court recognized in *United States* v. *Procter & Gamble Co.*, 356 U. S. 677 (1958), the proper approach to the danger of abuse is not to adopt an across-the-board ban on civil use of grand jury materials by those not assigned to the criminal investigation, but rather for a district court to impose appropriate sanctions if it turns out that the grand jury process has been abused to elicit evidence for a civil case. In *Procter & Gamble*, this Court indicated that one available remedy for abuse would be compensating disclosure to civil defendants. In other cases it might prove appropriate to prohibit the Government from making any use of grand jury materials in prosecuting its civil case. And in egregious cases it might be proper to hold certain individuals in contempt. Here, however, the District Court found no grand jury abuse.[11]

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[10] I find it a bit ironic, however, that the Court relies solely on this Court's decision in *United States* v. *Procter & Gamble Co.*, 356 U. S. 677 (1958), for the above proposition, inasmuch as that decision itself recognized the Government's authority to use materials from a properly convened grand jury without a court order in pursuing a civil action—and thus is completely at odds with the Court's holding today. See *supra*, at 457–458.

Finally, the Court argues that civil use of grand jury materials would subvert the limitations on civil discovery and investigation that would otherwise apply. *Ante*, at 433–434. As the basis for this contention, the Court relies primarily on the Civil Division's access to the discovery provisions of the Federal Rules of Civil Procedure. The Court argues that the need for and limitations on this discovery method would be undermined by allowing Government attorneys automatic access to grand jury materials for use in civil actions. This argument rests on the assumption that the civil discovery provisions of the Federal Rules of Civil Procedure were designed with but a single Division of the Justice Department in mind. Plainly that is untrue. The Federal Rules of Civil

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[11] In any event, the Court's standard does not meet the asserted problem of grand jury abuse. The Court suggests that a bright-line standard is needed to eliminate the temptation to initiate grand jury investigations for civil purposes and to avoid problems of detecting and proving grand jury misuse. See *ante*, at 432. Apart from the reality that this burns down the house to get rid of the mouse, the vague and indefinite standard actually adopted by the Court does not meet the concerns which the Court's opinion expresses. Even if one accepts the Court's wholly unsupported assumption that Government attorneys often misuse grand juries, the Court's own standard will leave much of the potential for misuse intact; the decision apparently continues to allow those assigned to the grand jury investigation or prosecution to make continued use of the grand jury materials in subsequent civil litigation. Under the Court's approach, reviewing courts will still be faced with the task of determining whether the grand jury was initiated for civil or criminal purposes, in those cases where a member of the investigative team has used grand jury materials in prosecuting a later civil case.

Procedure govern virtually all civil actions, the vast majority of which involve only private litigants. The civil discovery provisions were undoubtedly designed with these private litigants in mind, and the Civil Division of the Department has simply been relegated by the Court to the civil discovery provisions for lack of a better alternative.[12] Of course, if attorneys for the Justice Department are considering a civil action, they may not institute a grand jury in order to develop evidence for that civil case, but must make use of the available means for civil investigations. When a valid grand jury investigation has taken place, however, nothing in the Federal Rules of Civil Procedure precludes attorneys in the Justice Department from making use of the grand jury materials in preparing for and prosecuting civil suits.

Besides greatly overstating the interests that would be served by a blanket rule prohibiting attorneys from examining grand jury materials for possible civil prosecution, the Court also has given very short shrift to the public interests that are served by allowing Government attorneys access to grand jury materials for the full range of their responsibilities. The Court dismisses these interests as "nothing more than a matter of saving time and expense." *Ante*, at 431. This cavalier comment overlooks the vital importance of time and money in the proper functioning of any system. The unwarranted burdens that the Court's rule imposes upon the Department of Justice will not mean simply that the Government must pay more to keep the system operating. Rather, the additional time and expense will result in a substantial decrease in the Government's ability to enforce important laws in meritorious civil actions—thus striking a severe blow to the public interest.[13]

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[12] In my view, the civil discovery provisions of the Federal Rules are wholly insufficient for the Department of Justice to carry out its responsibilities to pursue fraud claims effectively. Under the Federal Rules, discovery may not normally take place until *after* a complaint has been filed. Yet *before* filing a complaint, an attorney must satisfy himself that to the best of his knowledge "there is good ground to support it." Fed. Rule Civ. Proc. 11. In a typical action between private parties, the parties themselves will have sufficient personal knowledge to determine whether an action is warranted. Civil Division attorneys seldom have actual personal knowledge of the underlying facts, however, and frequently must undertake additional investigation before they will be able to ascertain whether litigation is appropriate. If limited to voluntary cooperation or the civil discovery provisions, therefore, those attorneys will be unable to pursue many frauds against the public. These same concerns led Congress to enact legislation authorizing the Antitrust Division to issue civil investigative demands, Pub. L. 87–664, § 3, 76 Stat. 548, 15 U. S. C. § 1312. See Report of the Attorney General's National Committee to Study the Antitrust Laws 344–345 (1955). The Civil Division has not been provided with similar authority to issue civil investigative demands.

Even more importantly, however, the Court's casual dismissal of the interests involved as "mere time and money" displays a profound insensitivity to the nature and role of the Department of Justice. Ever since the enactment of the Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 92, both civil and criminal litigation responsibilities have been vested in the Attorney General and the several United States Attorneys. The Attorney General is *the* attorney for the Government. At one time the Attorney General served alone, for many years without a single clerk or aide. Even after the establishment of the Department of Justice in 1870, the Attorney

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[13] It bears note, moreover, that not just the Government's time and money are at stake. Witnesses who have testified fully before the grand jury may have their schedules disrupted again for civil investigations. In many civil cases, a number of witnesses would undoubtedly be deposed in any event; but other witnesses will be forced to undergo the burden of appearing for testimony that would be unnecessary if Government attorneys had access to the grand jury materials. In addition, witnesses may die, their memories may fade, records may be lost, and statutes of limitations may run. Presumably, even under the Court's approach, Government attorneys could gain access to the grand jury materials through a court order in the first three of those situations—if the attorneys learned that the witnesses had testified before the grand jury or produced the relevant records. Where the statute of limitations has run, however, there would be no such relief.

General served with only a handful of assistants; they shared responsibility for all the Government's litigation, criminal and civil. See generally H. Cummings & C. McFarland, Federal Justice 78–92, 142–160, 218–229 (1937). As a practical matter, certain individuals may have had greater involvement in civil matters than others, but distinctions between those responsible for civil matters and those handling criminal matters were at one time unheard of. Over the years, the Department has grown dramatically, and a result has been the administrative separation of the Department into a number of Divisions, each of which has primary responsibility for a particular type of case. Even today, though, many of the Divisions have both civil and criminal enforcement responsibilities. See, *e. g.*, 28 CFR § 0.40(a) (1982) (Antitrust Division); 28 CFR §§ 0.55(c), (d), (f)–(i), (n), (s) (1982) (civil jurisdiction of the Criminal Division). Moreover, now, as in the past, the Attorney General has complete authority to assign either civil or criminal responsibilities, or both, to any attorney in the Department of Justice. See, *e. g.*, Rev. Stat. §§ 359, 360; 28 U. S. C. §§ 510, 515(a).[14]

The Department of Justice might well be referred to as the world's largest law firm, and its various Divisions work together toward the ultimate objective for which they were created—to promote the interests of the sovereign and of the public. Grand jury investigations of criminal activity of course play a major role in protecting the Nation and advancing the public interest by deterring violations of our laws. Many civil actions seek precisely the same object, however, and are of at least equal importance in promoting the public welfare. In a number of areas, Congress has enacted civil legislation that, together with related criminal law provisions, forms an integrated law enforcement scheme. This is, of course, true of the injunctive provisions of the Sherman Act that were at issue in *Procter & Gamble.* Most significantly for present purposes, the civil provisions of the False Claims Act at issue here were enacted as part of an integrated scheme of civil and criminal law enforcement. See *United States* v. *Bornstein*, 423 U. S. 303, 305–307, n. 1 (1976). In enacting the False Claims Act, Congress instructed the United States Attorneys "to be diligent in inquiring into *any* violation" of the Act, Rev. Stat. § 3492 (emphasis added). There can be little doubt that Congress expected—and continues to expect—attorneys for the Government to investigate the possibility of both criminal and civil violations when applying this and other integrated enforcement schemes. Under these circumstances, it would at the very least be anomalous if a Government attorney should discover evidence pointing to civil violations during a grand jury investigation, but fail to refer these violations to other attorneys within the Department of Justice for possible prosecution. Indeed, such a failure might well merit a disciplinary inquiry.

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[14] Thus, for example, 28 U. S. C. § 515(a) provides:

"The Attorney General or any other officer of the Department of Justice . . . may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings . . . which United States Attorneys are authorized by law to conduct . . . ."

In some cases, of course, even before a grand jury investigation starts the Department of Justice will have sufficient information to justify filing a civil complaint. In many other cases, however, the Department will have no more than a suspicion of civil violations; and on occasion, the relevant information will come as a complete surprise. In those cases, unless the attorney conducting the grand jury is entitled to disclose the substance of the grand jury investigation to attorneys within the Civil Division, those attorneys will remain oblivious to the existence of much illegal behavior and will not have sufficient basis even to file civil complaints. And until a complaint is filed, they will be unable to utilize the discovery provisions of the Federal Rules of Civil Procedure, upon which the Court places so much weight. Thus, the question is not simply whether the Civil Division is able to afford the time and expense necessary to conduct a civil investigation. Rather, the real issue in many cases is whether the Government will be in a position to initiate any civil action at all.

Finally, perhaps the most troubling aspect of the Court's stilted holding is the opinion's virtual silence on any meaningful guidance for the lower courts and the Department of Justice. Plainly, any Government attorney, including any attorney normally assigned to civil cases, who has been assigned to the criminal grand jury investigation or prosecution is entitled to automatic access to grand jury materials for these criminal purposes. It also seems clear that, under the Court's standard, attorneys who take no part in the criminal investigation or prosecution are not entitled to automatic disclosure of the actual grand jury transcript and materials for civil purposes, without court authorization. With those two exceptions, today's opinion provides almost no guidance as to the permissible scope of Justice Department use of grand jury materials.

The Court frames the question presented by this case as being whether (A)(i) permits automatic disclosure of grand jury materials for "preparation and litigation of a civil suit by a Justice Department attorney *who had no part in conducting the related criminal prosecution.*" *Ante*, at 428 (emphasis added). The Court states that "[t]he policies of Rule 6 require that any disclosure *to attorneys other than prosecutors* be judicially supervised rather than automatic," *ante*, at 435 (emphasis added), and holds that "(A)(i) disclosure is limited to *use* by *those attorneys who conduct the criminal matters* to which the materials pertain," *ante*, at 427 (emphasis added). From these and similar statements, it is reasonable to read today's decision as allowing any Justice Department attorney who has participated in the grand jury investigation or prosecution—and thus already has had access to the grand jury materials—to make further use of those materials in preparing and litigating a related civil case. Logically, this must mean that any attorney assigned by the Attorney General to assist in a criminal fraud investigation or prosecution may use the grand jury materials for subsequent civil fraud litigation. The Court deliberately chooses to avoid these issues, however, on the ground that they are not squarely presented by this case. *Ante*, at 431, n. 15. See also, *e. g.*, *ante*, at 429, n. 11, 434, n. 19, 441–442, and n. 33.

In addition, I assume that, if a grand jury turns up plain evidence of fraud that properly should be pursued by Government lawyers, the Court would allow a prosecutor to disclose the substance of the violations to his colleagues, so that those attorneys might file a civil complaint—if they have not already done so—and commence civil discovery. And when a grand jury discovers fraud, the prosecutor surely should be able to seek a court order under Rule 6(e)(3)(C)(i) enabling him to disclose the relevant portions of the actual grand jury transcripts and materials to other attorneys for prosecution of the civil fraud claims. Here again, the Court plainly is aware of the issues, see *ante*, at 441–442, but fails to provide any guidance on their proper resolution.

Of course, the job of this Court is to decide the case before it, and not to issue advisory opinions on matters far afield. But to my mind, when the Court announces a standard that appears nowhere in the relevant Rule, that overturns more than 30 years of established practice, and that will force a complete reevaluation and restructuring of Justice Department procedures regarding use of grand jury materials, the Court has an obligation to provide some guidance to the Department and to other courts on vitally important issues that are fairly embraced by the decision. I find it curious that a majority of this Court feels no such duty.

IV

The opinion of the Court today upsets longstanding practice of the Justice Department regarding disclosure of grand jury materials for civil use, without affording that Department or the courts meaningful guidance on the permissible limits of disclosure to other attorneys *within the Department* in the future. Although the bounds of today's decision are wholly undefined, it is clear that the decision will greatly limit disclosure of grand jury materials for civil use; and it is inevitable that countless meritorious civil actions will never be investigated or prosecuted, unless the Attorney General routinely assigns civil fraud lawyers to help work up criminal fraud cases. On its face, this process will be a wasteful practice in terms of use of the time of Department lawyers. This result is contrary to the plain language and history of Rule 6(e)(3)(A)(i), and to elementary considerations of sound policy. I therefore dissent.

UNITED STATES *v.* BAGGOT

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 81-1938. Argued March 2, 1983—Decided June 30, 1983

Federal Rule of Criminal Procedure 6(e)(3)(C)(i) permits disclosure otherwise prohibited by Rule 6 of matters occurring before a grand jury "when so directed by a court preliminarily to or in connection with a judicial proceeding." Respondent was the target of a grand jury investigation of certain commodity futures transactions. He was never indicted but, after plea negotiations, pleaded guilty to misdemeanor violations of the Commodity Exchange Act. Thereafter, the Government filed a motion under Rule 6(e)(3)(C)(i) for disclosure of grand jury transcripts and documents to the Internal Revenue Service (IRS) for use in an audit to determine respondent's civil income tax liability. While holding that disclosure was not authorized by Rule 6(e)(3)(C)(i), the District Court nevertheless allowed disclosure under its "general supervisory powers over the grand jury." The Court of Appeals reversed, agreeing that no disclosure is available under Rule 6(e)(3)(C)(i) but holding that the District Court erred in granting disclosure under "general supervisory powers."

Held: The IRS's civil tax audit is not "preliminar[y] to or in connection with a judicial proceeding" within the meaning of Rule 6(e)(3)(C)(i), and hence no disclosure is available under that Rule. The Rule contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated. It is not enough to show that some litigation may emerge from the matter in which the material is to be used. The focus is on the *actual use* to be made of the material. It follows that disclosure is not appropriate for use here in the IRS's audit, the purpose of which is not to prepare for or conduct litigation but to assess the amount of tax liability through administrative channels. The fact that if the audit discloses a deficiency, respondent may seek judicial redress in a redetermination proceeding in the Tax Court or in a refund action in the Court of Claims or a district court, without more, does not mean that the Government's action is "preliminar[y] to . . . a judicial proceeding." Pp. 478–483.

662 F. 2d 1232, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BURGER, C. J., filed a dissenting opinion, *post*, p. 483.

Deputy Solicitor General Wallace argued the cause for the United States. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Archer, Harriet S. Shapiro, Robert E. Lindsay,* and *William A. Whitledge.*

Samuel J. Betar argued the cause and filed a brief for respondent.*

JUSTICE BRENNAN delivered the opinion of the Court.

In *United States* v. *Sells Engineering, Inc., ante,* p. 418, we decide today that in some circumstances the Government may obtain disclosure of grand jury materials for civil uses under Federal Rule of Criminal Procedure 6(e)(3)(C)(i) (hereinafter sometimes referred to as (C)(i)). The question in this case is whether an Internal Revenue Service investigation to determine a taxpayer's civil tax liability is "preliminar[y] to or in connection with a judicial proceeding" within the meaning of that Rule. We agree with the Court of Appeals that it is not.

In May 1976, a special grand jury began investigating certain commodity futures transactions on the Chicago Board of Trade. Respondent James E. Baggot became a target of the investigation. He was never indicted; instead, after interviews with IRS agents and plea negotiations with the Government, he pleaded guilty to two misdemeanor counts of violating the Commodity Exchange Act.[1] The substance of Baggot's crime was a scheme to use sham commodities transactions to create paper losses, which he deducted on his tax returns. A fraction of the "losses" was then recovered in cash kickbacks which were not reported as income.

About eight months after Baggot's plea, the Government filed a (C)(i) motion for disclosure of grand jury transcripts and documents to the IRS, for its use in an audit to deter-

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*Briefs of *amici curiae* urging affirmance were filed by *Erwin N. Griswold* and *Otis M. Smith* for General Motors Corp.; and by *Arlington Ray Robbins* and *Michael E. Cahill* for Fred Witte et al.

[1] 7 U. S. C. § 6c(a)(A).

mine Baggot's civil income tax liability. At first the District Court denied the request. After two renewed motions, however, the court granted disclosure. It held that some of the materials sought are not "matters occurring before the grand jury," and therefore not subject to Rule 6(e)'s requirement of secrecy. With respect to the remainder of the materials, the court concluded that disclosure is not authorized by (C)(i) because the IRS's proposed civil tax investigation is not "preliminar[y] to or in connection with a judicial proceeding." Nevertheless, the court allowed disclosure under its "general supervisory powers over the grand jury." App. to Pet. for Cert. 47a–48a.

The Court of Appeals reversed. *In re Special February, 1975 Grand Jury (Baggot)*, 662 F. 2d 1232 (CA7 1981). It held that all the materials sought, with one possible exception, are "matters occurring before the grand jury" and therefore subject to Rule 6(e). It agreed with the District Court that no disclosure is available under (C)(i), but it held that the District Court erred in granting disclosure under "general supervisory powers." It remanded the case for further consideration concerning the material that might not be "matters occurring before the grand jury." The Government sought certiorari, limited to the question of whether the IRS's civil tax audit is "preliminar[y] to or in connection with a judicial proceeding" under (C)(i). We granted certiorari. 457 U. S. 1131 (1982).

The IRS is charged with responsibility to determine the civil tax liability of taxpayers. To this end, it conducts examinations or audits of taxpayers' returns and affairs. If, after the conclusion of the audit and any internal administrative appeals, the IRS concludes that the taxpayer owes a deficiency, it issues a formal notice of deficiency as prescribed by 26 U. S. C. § 6212 (1976 ed. and Supp. V). Upon receiving a notice of deficiency, the taxpayer has, broadly speaking, four options: (1) he can accept the IRS's ruling and pay the amount of the deficiency; (2) he can petition the Tax

Court for a redetermination of the deficiency; (3) he can pay the amount of the deficiency and, after exhausting an administrative claim, bring suit for a refund in the Claims Court or in district court; or (4) he can do nothing and await steps by the IRS or the Government to collect the tax. See generally 4 B. Bittker, Federal Taxation of Income, Estates and Gifts ¶¶ 111.5, 112.1, 115.1, 115.2, 115.7 (1981).

Certain propositions are common ground between the parties. Both sides, sensibly, understand the term "in connection with," in (C)(i), to refer to a judicial proceeding already pending, while "preliminarily to" refers to one not yet initiated. The Government concedes that an IRS audit, including its informal internal appeal component, is not itself a "judicial proceeding" within the meaning of the Rule. Conversely, Baggot agrees that either a Tax Court petition for redetermination or a suit for refund would be a "judicial proceeding."[2] The issue, then, is whether disclosure for use in an IRS civil audit is "preliminar[y] to" a redetermination proceeding or a refund suit within the meaning of (C)(i).[3] We conclude that it is not.

The provision in (C)(i) that disclosure may be made "preliminarily to or in connection with a judicial proceeding" is, on its face, an affirmative limitation on the availability of court-ordered disclosure of grand jury materials. In our previous cases under Rule 6(e), we have not had occasion to address this requirement in detail, focusing instead on the requirement that the moving party show particularized need for access to grand jury materials. See *Sells, ante,* at 442–446, and cases cited. The two requirements, though related in some ways,[4] are independent prerequisites to (C)(i) disclosure. The particularized-need test is a criterion of *degree;* the "judicial proceeding" language of (C)(i) imposes an additional criterion governing the *kind* of need that must be shown. It reflects a judgment that not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for breaching grand jury secrecy. Rather, the Rule contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated. Thus, it is not enough to show that some litigation may emerge from the matter in which the material is to be used, or even that litigation is factually likely to emerge. The focus is on the *actual use* to be made of the material. If the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure under (C)(i) is not permitted. See *United States* v. *Young,* 494 F. Supp. 57, 60–61 (ED Tex. 1980).

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[2] Hence, we need not address in this case the knotty question of what, if any, sorts of proceedings other than garden-variety civil actions or criminal prosecutions might qualify as judicial proceedings under (C)(i). See generally, *e. g.*, *Bradley* v. *Fairfax*, 634 F. 2d 1126, 1129 (CA8 1980); *In re J. Ray McDermott & Co.*, 622 F. 2d 166, 170–171 (CA5 1980); *In re Special February 1971 Grand Jury* v. *Conlisk*, 490 F. 2d 894, 897 (CA7 1973); *Doe* v. *Rosenberry*, 255 F. 2d 118, 120 (CA2 1958).

[3] Our decision is limited to the meaning of (C)(i). Other considerations may govern the construction of similar standards in other contexts (*e. g.*, Fed. Rule Civ. Proc. 26(b)(3) ("in anticipation of litigation or for trial")).

It follows that disclosure is not appropriate for use in an IRS audit of civil tax liability, because the purpose of the audit is not to prepare for or conduct litigation, but to assess the amount of tax liability through administrative channels.[5]

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[4] The particularized-need test requires that the materials sought be "needed to avoid a possible injustice in another judicial proceeding" and that the moving party's request be "structured to cover only material so needed." *Douglas Oil Co.* v. *Petrol Stops Northwest,* 441 U. S. 211, 222 (1979) (footnote omitted). See generally *id.,* at 221–224; *United States* v. *Sells Engineering, Inc., ante,* at 442–446. These inquiries cannot even be made without consideration of the particulars of the judicial proceeding with respect to which disclosure is sought. See also the proposed new Rule 6(e)(3)(E), to take effect August 1, 1983.

[5] The Government relies on a remark by Wayne LaFave (Reporter for the Advisory Committee on Rules) during congressional hearings leading to the 1977 amendment to Rule 6(e). See generally *United States* v. *Sells Engineering, Inc., ante,* at 436–442. In response to a question, LaFave

Assuming, *arguendo*, that this audit will inevitably disclose a deficiency on Baggot's part, see also n. 6, *infra*, there is no particular reason why that must lead to litigation, at least from the IRS's point of view. The IRS's decision is largely self-executing, in the sense that it has independent legal force of its own, without requiring prior validation or enforcement by a court. The IRS need never go into court to assess and collect the amount owed; it is empowered to collect the tax by nonjudicial means (such as levy on property or salary, 26 U. S. C. §§ 6331, 6332), without having to prove to a court the validity of the underlying tax liability. Of course, the matter may end up in court if Baggot chooses to take it there, but that possibility does not negate the fact that the primary use to which the IRS proposes to put the materials it seeks is an extrajudicial one—the assessment of a tax deficiency by the IRS. The Government takes countless actions that affected citizens are permitted to resist or challenge in court. The fact that judicial redress may be sought, without more, does not mean that the Government's action is "preliminar[y] to a judicial proceeding." Of course, it may often be loosely said that the Government is "preparing for

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agreed that a "tax hearing" would be considered a judicial proceeding for purposes of Rule 6(e). Hearings on Proposed Amendments to the Federal Rules of Criminal Procedure before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 95th Cong., 1st Sess., 94 (1977). LaFave's somewhat ambiguous reference to a "tax hearing," however, cannot reasonably be taken to refer to an administrative audit. As LaFave explained earlier:

"[T]he cases say that the grand jury material cannot be turned over to an administrative agency for purely administrative proceedings, because that is not a judicial proceeding. But there are occasions when an administrative agency can show sufficient need with respect to pending judicial proceedings." *Id.*, at 86.

Indeed, if LaFave's remark meant what the Government now takes it to mean, LaFave's position would be inconsistent with the Government's own position, which is that the audit is not *itself* a judicial proceeding but only *preliminary to* one.

litigation," in the sense that frequently it will be wise for an agency to anticipate the chance that it may be called upon to defend its actions in court. That, however, is not alone enough to bring an administrative action within (C)(i). Where an agency's action does not require resort to litigation to accomplish the agency's present goal, the action is not preliminary to a judicial proceeding for purposes of (C)(i).

We need not decide whether an agency's action would always be preliminary to litigation if it arose under an administrative scheme that does require resort to courts—one in which, for example, the agency, when it found a probable violation of law, was required to bring a civil suit or criminal prosecution to vindicate the law and obtain compliance.[6] We also do not hold that the Government (or, for that matter, a private party who anticipates a suit or prosecution against him) may never obtain (C)(i) disclosure of grand jury materials any time the initiative for litigating lies elsewhere.[7] Nor do we hold that such a party must always await the actual commencement of litigation before obtaining disclosure. In *In re Grand Jury Proceedings, Miller Brewing Co.*, 687 F. 2d 1079 (CA7 1982), rehearing pending, for example, the IRS had closed its audit and issued a notice of deficiency, and the taxpayer had clearly expressed its intention to seek redetermination of the deficiency in the Tax Court. The same court that denied disclosure in this case correctly held in *Miller Brewing* that the IRS may seek (C)(i) disclosure. In such a case, the Government's primary purpose is plainly to use the materials sought to defend the Tax Court litigation, rather than to conduct the administrative inquiry that preceded it. There may be other situations in which disclosure is proper; we need not canvass the possibilities here. In this case, however, it is clear that the IRS's proposed use of the materials is to perform the nonlitigative function of assessing taxes rather than to prepare for or to conduct litigation. Hence, no disclosure is available under (C)(i).

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[6] In particular, we find it unnecessary to address the complex contentions of the parties as to the level of likelihood of litigation that must exist before an administrative action is preliminary to litigation. Baggot points out that the purpose of an audit is to determine whether *or not* he owes any tax deficiency. Thus, he argues, the occurrence of litigation is contingent not only on his decision to contest an assessment, see n. 7, *infra*, but on the outcome of the audit itself. He concludes that administrative investigations of this kind can never qualify as "preliminar[y] to a judicial proceeding," since to posit a judicial proceeding is to prejudge the very question supposedly being decided in the investigation. See, *e. g.*, *United States* v. *Bates*, 200 U. S. App. D. C. 296, 627 F. 2d 349 (1980); *McDermott*, 622 F. 2d, at 171; *In re Grand Jury Proceedings*, 309 F. 2d 440, 443–444 (CA3 1962). The Government counters that when the taxpayer has already pleaded guilty to a tax scam, the prospect of exoneration from civil liability is more theoretical than real. See, *e. g.*, *In re Judge Elmo B. Hunter's Special Grand Jury Empaneled September 28, 1978*, 667 F. 2d 724 (CA8 1981); see also *Doe* v. *Rosenberry*, 255 F. 2d, at 119–120. As a general matter, many an investigation, begun to determine *whether* there has been a violation of law, reaches a tentative affirmative conclusion on that question; at that point, the focus of the investigation commonly shifts to ascertaining the scope and details of the violation and building a case in support of any necessary enforcement action. We decline in this case to address how firm the agency's decision to litigate must be before its investigation can be characterized as "preliminar[y] to a judicial proceeding," or whether it can ever be so regarded before the conclusion of a formal preliminary administrative investigation.

The judgment of the Court of Appeals is

Affirmed.

CHIEF JUSTICE BURGER, dissenting.

The Court today holds that administrative agencies may not inspect grand jury materials unless the "primary purpose of disclosure" is "to assist in preparation or conduct of a judicial proceeding . . . ." *Ante*, at 480. This holding is not compelled by either the language or history of Rule 6(e), and it ignores the vital public interest in effective law enforcement in noncriminal cases. I therefore dissent.

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[7] We reject Baggot's argument that litigation is a remote contingency because, if a deficiency is assessed against him, he may simply choose to pay it, or to negotiate some settlement with the Government. The Government correctly points out that settlement (including settlement by surrender) is almost always a possibility. If some chance of settlement were enough to disqualify a case from eligibility for (C)(i) disclosure, there would be nothing left of the "preliminarily to" language of the Rule. There may conceivably be instances in which the chances of litigation are so low that it cannot be considered a realistic possibility, but this case at least is not such an instance.

Rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedure provides that a district court may in its discretion order disclosure of grand jury materials "*preliminarily to* or in connection with a judicial proceeding." (Emphasis added.) It is evident from the language of the Rule that disclosure prior to the actual filing of a complaint was contemplated by the Congress. Disclosure "*in connection with* a judicial proceeding" encompasses those situations where a suit is pending or about to be filed. The words "*preliminarily to*" necessarily refer to judicial proceedings not yet in existence, where, for example, a claim is under study. The Court's interpretation of this language effectively reads the words "preliminarily to" out of the Rule. The Court interprets the Rule to apply only to cases where the "actual use" of the materials sought is to prepare for or conduct litigation. *Ante*, at 480. If this were indeed Congress' intent, then it would have sufficed to allow disclosure "in connection with judicial proceedings" without the added words permitting disclosure "preliminarily to" judicial proceedings. As the Court now interprets the Rule, disclosure prior to the filing of a complaint will only rarely be permitted.

It is unclear from the legislative history exactly what Congress intended the phrase "preliminarily to or in connection with a judicial proceeding" to mean with respect to disclosure to administrative agencies. That phrase has been unchanged since the original Rule 6 was adopted in 1946. The 1946 Advisory Committee Notes explained that the Rules codified the traditional doctrine of grand jury secrecy. 18 U. S. C. App., p. 1411. The two cases cited by the 1946 Notes as examples of the traditional practice involved motions for disclosure—which were denied—in connection with an existing judicial proceeding, and not in connection with an administrative investigation or hearing. *Schmidt* v. *United States*, 115 F. 2d 394 (CA6 1940); *United States* v. *American Medical Assn.*, 26 F. Supp. 429 (DC 1939). In short, it does not appear that Congress in 1946 intended by these words "to resolve the tension between administrative agencies' need for information and grand juries' need for secrecy." See Note, Facilitating Administrative Agency Access to Grand Jury Material, 91 Yale L. J. 1614, 1620–1625 (1982).

The legislative history to the 1977 amendments to Rule 6(e) offers somewhat more guidance to Congress' intent with respect to disclosure to administrative agencies. Those amendments carried over unchanged the "preliminarily to or in connection with" language of the 1946 Rule. The amendments were primarily concerned with spelling out to whom and under what conditions Government attorneys in the Department of Justice could disclose grand jury materials to other Government personnel who were assisting in the criminal investigation. The Senate Report on the amendments stated that the amendments were intended to balance the need for prosecutors to have the assistance of other Government personnel against the fear that such indirect agency access "will lead to misuse of the grand jury to enforce noncriminal Federal laws . . . ." S. Rep. No. 95–354, p. 8 (1977). However, the Report specifically stated that in balancing these interests:

> "[T]here is . . . no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes. On the contrary, *there is no reason why such use is improper*, assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation. . . ." *Ibid.* (emphasis added).

This language plainly states the two conflicting policies with which Congress was concerned: to promote effective enforcement of civil claims by allowing agencies access to grand jury material for civil purposes, and to prevent the abuse of the grand jury as a tool for civil discovery.

The Senate Report concluded that "the Committee believes and intends that the basis for a court's refusal to issue an order under paragraph (C) to enable the government to disclose grand jury information in a non-criminal proceeding should be no more restrictive than is the case today under prevailing court decisions." *Ibid.* (footnote omitted). This reference to Rule 6(e)(3)(C) suggests that Congress understood that the conflicting policies of the Rule would be balanced by the district courts in weighing a motion for disclosure under the "preliminarily to or in connection with judicial proceedings" provision.

One of the two cases cited by the Senate Report as evidence of "prevailing court decisions" was *Robert Hawthorne, Inc.* v. *Director of Internal Revenue*, 406 F. Supp. 1098, 1126 (ED Pa. 1976). In *Robert Hawthorne*, Internal Revenue Service agents assisted federal prosecutors investigating possible criminal tax violations via a grand jury. The District Court held that this assistance was proper, and also held that upon termination of the grand jury investigation, the IRS's "future use of the materials to which it had access will follow as though there had been no access." *Id.*, at 1129. In such a case, the IRS could petition "for disclosure under the second sentence of Rule 6(e) permitting disclosure upon order of court preliminary to or in connection with a judicial proceeding." *Id.*, at 1129, n. 62. The *Robert Hawthorne* court assumed that a motion for disclosure would be proper; it did not suggest that such a motion would be premature if the agency was not yet preparing for or conducting litigation.

The House debates on the 1977 amendments also suggest that Congress understood the Rule to permit disclosure to agencies prior to the onset of litigation. Representative Charles Wiggins stated that although a Government agent assisting the prosecutor is "not free to share [grand jury] information within the agency which directly employs him," once a violation of civil laws is uncovered, the agency could seek disclosure pursuant to a court order:

> "There will come a time when a grand jury uncovers violations of civil laws, or State or local laws. It then becomes the duty of the attorney for the Government, if he or some other attorney for the Government cannot act on that information, *to turn it over to the appropriate governmental agency so that such agency can do its duty.* However, the attorney for the Government may do this only after successfully seeking an order of the court." 123 Cong. Rec. 25196 (1977) (emphasis added).

Representative Wiggins did not say that disclosure would be improper if the agency were not already planning litigation. Rather, the thrust of his remarks is that disclosure would be proper to enable an agency to determine *whether* to conduct an investigation or bring a civil complaint. Of course, to seek successfully an order from the court, the agency would have to show that its need for the materials outweighed the interest in grand jury secrecy. *Illinois* v. *Abbott & Associates*, 460 U. S. 557, 567–568, n. 15 (1983); *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U. S. 211 (1979); *United States* v. *Procter & Gamble Co.*, 356 U. S. 677 (1958).

In reviewing the legislative history, it is apparent, as is often the case, that Congress did not focus directly on the precise issue presented here. Rather, the legislative history primarily "reflects a concern . . . with the policies underlying the rule—the prevention of grand jury abuse and the facilitation of civil law enforcement." Note, Federal Agency Access to Grand Jury Transcripts under Rule 6(e), 80 Mich. L. Rev. 1665, 1674–1675 (1982). Given the absence of clear statutory language or statements of legislative intent, I would be guided by the policies with which the Congress was concerned.

In focusing on the "actual use" of the grand jury materials, the Court attempts in a crude and rigid way to reconcile the conflicting policies at issue. I believe a better balance is struck by holding that the threshold test for disclosure under Rule 6(e)(3)(C)(i) is satisfied so long as there is a possibility that the agency's action, should it ultimately act, would be subject to judicial review. In this respect, it makes no difference whether the judicial review would be *de novo*, as here, or more limited; nor does it matter that the party adversely affected by agency action might choose to forgo judicial review. This kind of broad interpretation of the language "preliminarily to . . . a judicial proceeding" clearly enlarges the potential for aiding civil law enforcement. If this standard is met—as it often would be—the questions for the court would be whether the prosecutor has shown that the grand jury has not been used primarily for civil discovery purposes, and whether the agency's need for the materials outweighs the need for grand jury secrecy. This approach focuses attention on the key policies with which Congress was concerned in 1946 and again in 1977, and permits the courts to reconcile the competing interests on a case-by-case basis. See *id.*, at 1680–1689. The result will be to enhance civil law enforcement interests while reducing the risk of abuse.

The Court is proceeding on an assumption that Government agencies, with the assistance of prosecutors, will subvert the grand jury into a tool of civil discovery whenever possible. Accordingly, the Court erects a rigid barrier restricting agency access on the theory that this will remove the incentive for abuse. The fundamental flaw in this analysis is the idea that abuse of the grand jury is a common phenomenon, which, of course, it is not. Few cases of grand jury abuse have ever been reported, and even fewer since this Court made clear in *United States* v. *Procter & Gamble Co.*, *supra*, at 683, that the Government's use of "criminal procedures to elicit evidence in a civil case . . . would be flouting the policy of the law." Moreover, the tremendous pressure on Government prosecutors to investigate the federal crimes in their jurisdictions—crimes which today are both more numerous and complex than ever before—reduces the likelihood that prosecutors will be swayed from their primary tasks or violate professional ethical standards at the behest of agency personnel. Finally, there is no reason to think that the courts are incapable of policing such occasional abuses as might occur. On the contrary, the reported cases show the sensitivity of the courts to the risks of grand jury abuse, and their readiness to act to ensure the integrity of the grand jury. See, *e. g.*, *In re April 1956 Term Grand Jury*, 239 F. 2d 263 (CA7 1956); *United States* v. *Doe*, 341 F. Supp. 1350 (SDNY 1972); *Cohen* v. *Commissioner*, 42 TCM 312, 321 (1981).

In its battle against a largely phantom, "strawman" threat, the Court fails to account for the substantial costs its rule will impose on the public. In investigating complex financial crimes, federal prosecutors often seek assistance from such agencies as the Securities and Exchange Commission and the IRS. Agency personnel may devote countless thousands of lawyer hours assisting in the investigation of a criminal case. See, *e. g.*, Brief for United States in *United States* v. *Sells Engineering, Inc.*, O. T. 1982, No. 81–1032, p. 39, n. 37. To force the agencies to duplicate these investigations is not only a waste of resources; the result may be that some meritorious administrative actions will never be brought. See *United States* v. *Sells Engineering, Inc.*, *ante*, at 470, and n. 13 (BURGER, C. J., dissenting). I cannot believe that Congress intended or would approve such a result.

Applying these principles, I would reverse and remand. The IRS sought release of the grand jury information to determine whether to audit respondent. There was clearly a possibility that the IRS would take action that would be subject to judicial review. Indeed, on these facts it was almost certain that the IRS would assert a deficiency against respondent, who could then choose to pay it or contest it in court. Accordingly, I would hold that the disclosure was sought "preliminarily to" a judicial proceeding within the meaning of Rule 6(e)(3)(C)(i), and remand for determination whether the Government had shown sufficient need for the materials and that it had conducted the grand jury investigation in good faith.

BELKNAP, INC. *v.* HALE ET AL.

CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

No. 81-1966. Argued January 11, 1983—Decided June 30, 1983

When negotiations for a new collective-bargaining agreement between petitioner employer and the union representing certain of its employees reached an impasse, some of the employees went out on strike, and petitioner then unilaterally granted a wage increase for employees who stayed on the job. Petitioner also advertised for and hired "permanent" replacements for striking employees. Under federal labor law, where employees engage in an economic strike, the employer may hire permanent replacements whom he need not discharge even if the strikers offer to return to work unconditionally. However, if the strike is an unfair labor practice strike, the employer must discharge replacements in order to accommodate returning strikers. Based on the unilateral wage increase, the union filed unfair labor practice charges with the National Labor Relations Board (Board) against petitioner, which countered with charges of its own, and complaints were issued against both parties. In the meantime, petitioner assured its replacement employees that they would continue to be permanent replacements, but the unfair labor practice complaints were later dismissed by the Board pursuant to a settlement agreement between the parties under which petitioner agreed to reinstate the strikers. Respondents, replacement employees who were laid off to make room for returning strikers, then sued petitioner in a Kentucky state court to recover damages for misrepresentation and breach of contract. The trial court granted summary judgment for petitioner on the ground that respondents' causes of action were pre-empted by the National Labor Relations Act (NLRA), but the Kentucky Court of Appeals reversed.

Held: Respondents' causes of action for misrepresentation and breach of contract are not pre-empted. Pp. 498-512.

(a) The doctrine of *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132, proscribing state regulation and state-law causes of action concerning conduct that Congress intended to be unregulated, does not foreclose this suit. There is no indication that Congress intended conduct of an employer and a union, such as that involved here, to be controlled solely by the free play of economic forces, so as to preclude state-court damages actions by discharged replacement employees on the theory that such actions would upset the delicate balance of forces established by federal law. Entertaining suits such as the instant suit does not interfere with the asserted policy of federal law favoring settlement of labor disputes. There is no substantial impact on the availability of settlement of economic or unfair labor practice strikes because the employer may protect himself against suits like this by promising permanent employment to replacement employees, subject only to settlement with the union or to a Board unfair labor practice order directing reinstatement of strikers. Such contracts are sufficiently "permanent" to permit the employer who prevails in a strike to keep replacements he has hired if he prefers to do so. Pp. 499–507.

(b) Nor are respondents' causes of action pre-empted under *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, which held that state regulations and causes of action are presumptively pre-empted if they concern conduct that is actually or arguably either prohibited or protected by the NLRA. While the questions whether the strike was an unfair labor practice strike—requiring reinstatement of strikers—because of petitioner's unilateral wage increase and whether its offering permanent employment to respondents was also an unfair labor practice, were matters for the Board, nevertheless, under *Garmon* a State may regulate conduct arguably protected or prohibited by the NLRA if the conduct is of only peripheral concern to the NLRA or if it is so deeply rooted in local law that it cannot be assumed that Congress intended to pre-empt the application of state law. The critical inquiry is whether the controversy presented to the state court is identical to that which could be presented to the Board. Here, the controversies cannot fairly be called identical since the focus of the Board's determinations would be on the rights of strikers under federal law, whereas the state-court claims would concern the rights of replacement employees under state law. And at the same time the State has substantial interests in protecting its citizens from misrepresentations that have caused them grievous harm and in providing a remedy to its citizens for breach of contract. Pp. 507–512.

Affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 513. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and POWELL, JJ., joined, *post*, p. 523.

Larry E. Forrester argued the cause and filed a brief for petitioner.

Samuel A. Alito, Jr., argued the cause for the National Labor Relations Board as *amicus curiae* urging reversal.

On the brief were *Solicitor General Lee, Robert E. Allen, Norton J. Come,* and *Linda Sher.*

Cecil Davenport argued the cause for respondents. With him on the brief was *Hollis Searcy.**

JUSTICE WHITE delivered the opinion of the Court.

The federal labor relations laws recognize both economic strikes and strikes to protest unfair labor practices. Where employees have engaged in an economic strike, the employer may hire permanent replacements whom it need not discharge even if the strikers offer to return to work unconditionally. If the work stoppage is an unfair labor practice strike, the employer must discharge any replacements in order to accommodate returning strikers. In this case we must decide whether the National Labor Relations Act (NLRA or Act) pre-empts a misrepresentation and breach-of-contract action against the employer brought in state court by strike replacements who were displaced by reinstated strikers after having been offered and accepted jobs on a permanent basis and assured they would not be fired to accommodate returning strikers.

I

Petitioner Belknap, Inc., is a corporation engaged in the sale of hardware products and certain building materials. A bargaining unit consisting of all of Belknap's warehouse and maintenance employees selected International Brotherhood of Teamsters Local No. 89 (Union) as their collective-bargaining representative. In 1975, the Union and Belknap entered into an agreement which was to expire on January 31, 1978. The two opened negotiations for a new contract

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*Briefs of *amici curiae* urging reversal were filed by *J. Albert Woll, Laurence Gold,* and *George Kaufmann* for the American Federation of Labor and Congress of Industrial Organizations; and by *Lawrence M. Cohen* and *Stephen A. Bokat* for the Chamber of Commerce of the United States.

shortly before the expiration of the 1975 agreement, but reached an impasse. On February 1, 1978, approximately 400 Belknap employees represented by the Union went out on strike. Belknap then granted a wage increase, effective February 1, for union employees who stayed on the job.

Shortly after the strike began, Belknap placed an advertisement in a local newspaper seeking applicants to "permanently replace striking warehouse and maintenance employees."[1] A large number of people responded to the offer and were hired. After each replacement was hired, Belknap presented to the replacement the following statement for his signature:

> "I, the undersigned, acknowledge and agree that I as of this date have been employed by Belknap, Inc. at its

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[1] The advertisement said:

"PERMANENT EMPLOYEES WANTED

"BELKNAP, INC.

"111 EAST MAIN STREET
LOUISVILLE, KENTUCKY

"OPENINGS AVAILABLE FOR QUALIFIED PERSONS LOOKING FOR EMPLOYMENT TO PERMANENTLY REPLACE STRIKING WAREHOUSE AND MAINTENANCE EMPLOYEES.

"EXCELLENT EARNINGS, FRINGE BENEFITS AND WORKING CONDITIONS WITH STEADY YEAR-ROUND EMPLOYMENT.

"MINIMUM STARTING RATE $4.55 PER HOUR. TOP RATE $5.85, DEPENDING ON SKILL, ABILITY AND EXPERIENCE. PLUS INCENTIVE EARNINGS OVER HOURLY RATE FOR MOST JOBS.

"APPLY IN PERSON AT THE BELKNAP OFFICE LOCATED AT 111 EAST MAIN STREET BETWEEN 9:00 A.M. AND 2:30 P.M., MONDAY THRU FRIDAY. PARK IN COMPANY LOT AT 1st AND MAIN.

"WE ARE AN EQUAL OPPORTUNITY EMPLOYER"

> Louisville, Kentucky, facility as a regular full time permanent replacement to permanently replace ________ in the job classification of ____________________________."

On March 7, the Union filed unfair labor practice charges against petitioner Belknap. The charge was based on the unilateral wage increase granted by Belknap. Belknap countered with charges of its own. On April 4, the company distributed a letter which said, in relevant part:

> "TO ALL PERMANENT REPLACEMENT EMPLOYEES
>
> * * * * *
>
> "We recognize that many of you continue to be concerned about your status as an employee. The Company's position on this matter has not changed nor do we expect it to change. You will continue to be permanent replacement employees so long as you conduct yourselves in accordance with the policies and practices that are in effect here at Belknap.
>
> * * * * *
>
> "We continue to meet and negotiate in good faith with the Union. It is our hope and desire that a mutually acceptable agreement can be reached in the near future. However, we have made it clear to the Union that we have no intention of getting rid of the permanent replacement employees just in order to provide jobs for the replaced strikers if and when the Union calls off the strike."

On April 27, the Regional Director issued a complaint against Belknap, asserting that the unilateral increase violated §§ 8(a)(1), 8(a)(3), and 8(a)(5) of the Act.[2] Also on April 27, the company again addressed the strike replacements:

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[2] Section 8(a) of the National Labor Relations Act, 61 Stat. 140, as amended and as set forth in 29 U. S. C. § 158(a), provides, in relevant part:

> "We want to make it perfectly clear, once again, that there will be no change in your employment status as a result of the charge by the National Labor Relations Board, which has been reported in this week's newspapers.
>
> "We do not believe there is any substance to the charge and we feel confident we can prove in the courts satisfaction that our intent and actions are completely within the law."

A hearing on the unfair labor practice charges was scheduled for July 19. The Regional Director convened a settlement conference shortly before the hearing was to take place. He explained that if a strike settlement could be reached, he would agree to the withdrawal and dismissal of the unfair labor practice charges and complaints against both the company and the Union. During these discussions the parties made various concessions, leaving one major issue unresolved, the recall of the striking workers. The parties finally agreed that the company would, at a minimum, reinstate 35 strikers per week. The settlement agreement was then reduced to writing. Petitioner laid off the replacements, including the 12 respondents, in order to make room for the returning strikers.

Respondents sued Belknap in the Jefferson County, Ky., Circuit Court for misrepresentation and breach of contract. Belknap, they alleged, had proclaimed that it was hiring permanent employees, knowing both that the assertion was false

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"It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

* * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

and that respondents would detrimentally rely on it. The alternative claim was that Belknap was liable for breaching its contracts with respondents by firing them as a result of its agreement with the Union. Each respondent asked for $250,000 in compensatory damages, and an equal amount in punitive damages.

Belknap, after unsuccessfully seeking to remove the suit to federal court,[3] moved for summary judgment, on the ground that respondents' causes of action were pre-empted by the NLRA. The trial court agreed and granted summary judgment. The Kentucky Court of Appeals reversed. The court first concluded that pre-emption was inappropriate because Belknap's alleged activities were not unfair labor practices. Belknap's action was not prohibited by 29 U. S. C. § 158(a)(3), which makes unlawful discrimination in personnel decisions for the purpose of encouraging or discouraging membership in a particular union, since plaintiffs did not seek membership in any labor organization.[4] Relying on *Linn* v. *Plant Guard Workers*, 383 U. S. 53 (1966), the court also concluded that the suit was not pre-empted because the contract and misrepresentation claims were of only peripheral concern to the NLRA and were deeply rooted in local law. The Kentucky Supreme Court granted discretionary review, but later vacated its order as having been improvidently entered.

We granted Belknap's petition for certiorari, 457 U. S. 1131 (1982). We affirm.[5]

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[3] Respondents assert that Belknap's failure to appeal from the remand order bars Belknap from further litigating the pre-emption issue. The inference is that the state court lacks jurisdiction to proceed and that we should dismiss the petition. The remand order, however, is not reviewable. 28 U. S. C. § 1447(d).

[4] The court also noted that the misrepresentation and breach of contract involved nonunion individuals who were not parties to the collective-bargaining agreement between the Union and Belknap.

[5] The judgment of the Kentucky Court of Appeals is final within the meaning of 28 U. S. C. § 1257: it finally disposed of the federal pre-emption issue; a reversal here would terminate the state-court action; and to permit

II

Our cases have announced two doctrines for determining whether state regulations or causes of action are pre-empted by the NLRA. Under the first, set out in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), state regulations and causes of action are presumptively pre-empted if they concern conduct that is actually or arguably either prohibited or protected by the Act. *Id.*, at 245. The state regulation or cause of action may, however, be sustained if the behavior to be regulated is behavior that is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility. *Id.*, at 243–244; *Sears, Roebuck & Co.* v. *Carpenters*, 436 U. S. 180, 200 (1978); *Farmer* v. *Carpenters*, 430 U. S. 290, 296–297 (1977). In such cases, the State's interest in controlling or remedying the effects of the conduct is balanced against both the interference with the National Labor Relations Board's

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the proceedings to go forward in the state court without resolving the pre-emption issue would involve a serious risk of eroding the federal statutory policy of "'requiring the subject matter of respondents' cause to be heard by the . . . Board, not by the state courts.'" *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 483 (1975), quoting *Construction Laborers* v. *Curry*, 371 U. S. 542, 550 (1963). Or as JUSTICE REHNQUIST put it, our jurisdiction in *Curry* rested on the "understandable principle that where the proper forum for trying the issue joined in the state courts depends on the resolution of the federal question raised on appeal, sound judicial administration requires that such a question be decided by this Court, if it is to be decided at all, sooner rather than later in the course of the litigation." *Cox Broadcasting Corp.* v. *Cohn*, *supra*, at 506 (dissenting opinion). Thus, our grant of the petition for certiorari in this case was not infirm because of the lack of a final judgment; and our jurisdiction to affirm or reverse the Kentucky Court of Appeals on the pre-emption issue, an issue which is not by any means frivolous, is clear. That we affirm rather than reverse, thereby holding that federal policy would not be subverted by the Kentucky proceedings, is not tantamount to a holding that we are without power to render such a judgment; nor does it require us to dismiss this case for want of a final judgment. *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U. S. 386, 389, n. 4, 395 (1964); *Abney* v. *United States*, 431 U. S. 651, 662, 665 (1977).

ability to adjudicate controversies committed to it by the Act, *Farmer* v. *Carpenters, supra,* at 297; *Sears, Roebuck & Co.* v. *Carpenters,* 436 U. S., at 200, and the risk that the State will sanction conduct that the Act protects. *Id.*, at 205. The second pre-emption doctrine, set out in *Machinists* v. *Wisconsin Employment Relations Comm'n,* 427 U. S. 132 (1976), proscribes state regulation and state-law causes of action concerning conduct that Congress intended to be unregulated, *id.*, at 140, conduct that was to remain a part of the self-help remedies left to the combatants in labor disputes, *id.*, at 147–148.

Petitioner argues that the action was pre-empted under both *Garmon* and *Machinists.* The Board and the AFL–CIO, in *amicus* briefs, place major emphasis on *Machinists;* they argue that the Kentucky courts are attempting to impose Kentucky law with respect to areas or subjects that Congress intended to be unregulated. We address first the *Machinists* and then the *Garmon* submissions.

III

It is asserted that Congress intended the respective conduct of the Union and Belknap during the strike beginning on February 1 "'to be controlled by the free play of economic forces,'" *Machinists* v. *Wisconsin Employment Relations Comm'n, supra,* at 140, quoting *NLRB* v. *Nash-Finch Co.*, 404 U. S. 138, 144 (1971), and that entertaining the action against Belknap was an impermissible attempt by the Kentucky courts to regulate and burden one of the employer's primary weapons during an economic strike, that is, the right to hire permanent replacements. To permit the suit filed in this case to proceed would upset the delicate balance of forces established by the federal law. Subjecting the employer to costly suits for damages under state law for entering into settlements calling for the return of strikers would also conflict with the federal labor policy favoring the settlement of labor disputes. These arguments, it is urged, are valid whether or not a strike is an economic strike.

We are unpersuaded. It is true that the federal law permits, but does not require, the employer to hire replacements during a strike, replacements that it need not discharge in order to reinstate strikers if it hires the replacements on a "permanent" basis within the meaning of the federal labor law. But when an employer attempts to exercise this very privilege by promising the replacements that they will not be discharged to make room for returning strikers, it surely does not follow that the employer's otherwise valid promises of permanent employment are nullified by federal law and its otherwise actionable misrepresentations may not be pursued. See *J. I. Case Co.* v. *NLRB*, 321 U. S. 332 (1944); see *infra* at 505–506, 511–512, n. 13. We find unacceptable the notion that the federal law on the one hand insists on promises of permanent employment if the employer anticipates keeping the replacements in preference to returning strikers, but on the other hand forecloses damages suits for the employer's breach of these very promises. Even more mystifying is the suggestion that the federal law shields the employer from damages suits for misrepresentations that are made during the process of securing permanent replacements and are actionable under state law.

Arguments that entertaining suits by innocent third parties for breach of contract or for misrepresentation will "burden" the employer's right to hire permanent replacements are no more than arguments that "this is war," that "anything goes," and that promises of permanent employment that under federal law the employer is free to keep, if it so chooses, are essentially meaningless. It is one thing to hold that the federal law intended to leave the employer and the union free to use their economic weapons against one another, but is quite another to hold that either the employer or the union is also free to injure innocent third parties without regard to the normal rules of law governing those relationships. We cannot agree with the dissent that Congress intended such a lawless regime.

The argument that entertaining suits like this will interfere with the asserted policy of the federal law favoring settlement of labor disputes fares no better. This is just another way of asserting that the employer need not answer for its repeated assurances of permanent employment or for its otherwise actionable misrepresentations to secure permanent replacements. We do not think that the normal contractual rights and other usual legal interests of the replacements can be so easily disposed of by broad-brush assertions that no legal rights may accrue to them during a strike because the federal law has privileged the "permanent" hiring of replacements and encourages settlement.

In defense of this position, Belknap, supported by the Board in an *amicus* brief, urges that permitting the state suit where employers may, after the beginning of a strike, either be ordered to reinstate strikers or find it advisable to sign agreements providing for reinstatement of strikers, will deter employers from making permanent offers of employment or at the very least force them to condition their offer by stating the circumstances under which replacements must be fired. This would considerably weaken the employer's position during the strike, it is said, because without assuring permanent employment, it would be difficult to secure sufficient replacements to keep the business operating. Indeed, as the Board interprets the law, the employer must reinstate strikers at the conclusion of even a purely economic strike unless it has hired "permanent" replacements, that is, hired in a manner that would "show that the men [and women] who replaced the strikers were regarded by themselves and the [employer] as having received their jobs on a permanent basis." *Georgia Highway Express, Inc.*, 165 N. L. R. B. 514, 516 (1967), aff'd *sub nom. Truck Drivers and Helpers Local No. 728* v. *NLRB*, 131 U. S. App. D. C. 195, 403 F. 2d 921, cert. denied, 393 U. S. 935 (1968).[6]

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[6] See also *NLRB* v. *Mars Sales & Equipment Co.*, 626 F. 2d 567, 573 (CA7 1980); *NLRB* v. *Murray Products, Inc.*, 584 F. 2d 934, 939 (CA9 1978); *H. & F. Binch Co.* v. *NLRB*, 456 F. 2d 357, 362 (CA2 1972).

We remain unconvinced. If serious detriment will result to the employer from conditioning offers so as to avoid a breach of contract if the employer is forced by Board order to reinstate strikers or if the employer settles on terms requiring such reinstatement, much the same result would follow from Belknap's and the Board's construction of the Act. Their view is that, as a matter of federal law, an employer may terminate replacements, without liability to them, in the event of settlement or Board decision that the strike is an unfair labor practice strike. Any offer of permanent employment to replacements is thus necessarily conditional and nonpermanent. This view of the law would inevitably become widely known and would deter honest employers from making promises that they know they are not legally obligated to keep. Also, many putative replacements would know that the proffered job is, in important respects, nonpermanent and may not accept employment for that reason. It is doubtful, with respect to the employer's ability to hire, that there would be a substantial difference between the effect of the Board's preferred rule and a rule that would subject the employer to damages liability unless it suitably conditions its offers of employment made to replacements.[7]

Belknap counters that conditioning offers in such manner will render replacements nonpermanent employees subject to discharge to make way for strikers at the conclusion or settlement of a purely economic strike, which would not be the case if replacements had been hired on a "permanent" basis as the Board now understands that term. The balance of power would thus be distorted if the employer is forced to condition its offers for its own protection. Under Belknap's submission, however, which is to some extent supported by the Board, Belknap's promises, although in form assuring permanent employment, would as a matter of law be nonpermanent to the same extent as they would be if expressly conditioned on the eventuality of settlement requiring reinstatement of strikers and on its obligation to reinstate unfair labor practice strikers. As we have said, we cannot believe that Congress determined that the employer must be free to deceive by promising permanent employment knowing that it may choose to reinstate strikers or may be forced to do so by the Board.

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[7] The dissent's argument that state causes of action such as this must be pre-empted because they make it more difficult for the employer to hire replacements proves entirely too much. For example, it might be easier for an employer to obtain replacements by misstating the wages or fringe benefits that it would provide. But if the employer did so, surely the employees affected could seek protection in the state courts.

An employment contract with a replacement promising permanent employment, subject only to settlement with its employees' union and to a Board unfair labor practice order directing reinstatement of strikers, would not in itself render the replacement a temporary employee subject to displacement by a striker over the employer's objection during or at the end of what is proved to be a purely economic strike. The Board suggests that such a conditional offer "might" render the replacements only temporary hires that the employer would be required to discharge at the conclusion of a purely economic strike. Brief for NLRB as *Amicus Curiae* (NLRB Br.) 17. But the permanent-hiring requirement is designed to protect the strikers, who retain their employee status and are entitled to reinstatement unless they have been permanently replaced. That protection is unnecessary if the employer is ordered to reinstate them because of the commission of unfair labor practices. It is also meaningless if the employer settles with the union and agrees to reinstate strikers. But the protection is of great moment if the employer is not found guilty of unfair practices, does not settle with the union, or settles without a promise to reinstate. In that eventuality, the employer, although it has prevailed in the strike, may refuse reinstatement only if it has hired replacements on a permanent basis. If it has promised to keep the replacements on in such a situation, discharging them to make way for selected strikers whom it deems more experienced or more efficient would breach its contract with the replacements. Those contracts, it seems to us, create a sufficiently permanent arrangement to permit the prevailing employer to abide by its promises.[8]

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[8] The refusal to fire permanent replacements because of commitments made to them in the course of an economic strike satisfies the requirement of *NLRB* v. *Fleetwood Trailer Co.*, 389 U. S. 375, 380 (1967), that the employer have a "legitimate and substantial justification" for its refusal to reinstate strikers. That the offer and promise of permanent employment are conditional does not render the hiring any less permanent if the conditions do not come to pass. All hirings are to some extent conditional. As the Board recognizes, NLRB Br., at 16–17, although respondents were hired on a permanent basis, they were subject to discharge in the event of a business slowdown. Had Belknap not settled and no unfair practices been filed, surely it would have been free to retain respondents and obligated to do so by the terms of its promises to them. The result should be the same if Belknap had promised to retain them if it did not settle with the union and if it were not ordered to reinstate strikers.

The dissent and the concurrence make much of conditional offers of employment, asserting that they prevent replacements from being permanent employees. As indicated in the text, however, the Board's position is that even unconditional contracts of permanent employment are as a matter of law defeasible, first, if the strike turns out to be an unfair labor practice strike, and, second, if the employer chooses to settle with the union and reinstate the strikers. If these implied conditions, including those dependent on the volitional act of settlement, do not prevent the replacements from being permanent employees, neither should express conditions which do no more than inform replacements what their legal status is in any event.

The dissent and the concurrence suggest that if offers of permanent employment are not necessary to secure the manpower to keep the business operating, returning strikers must be given preference over replacements who have been hired on a permanent basis. That issue is not posed in this case, but we note that the Board has held to the contrary. In *Hot Shoppes, Inc.*, 146 N. L. R. B. 802, 805 (1964), the Board held as follows:

"We, however, disagree with the Trial Examiner's premise that an employer may replace economic strikers only if it is shown that he acted to preserve efficient operation of his business. The Supreme Court's decision in *Mackay Radio & Telegraph Company*, and the cases thereafter, although referring to an employer's right to continue his business during a

We perceive no substantial impact on the availability of settlement of economic or unfair labor practice strikes if the employer is careful to protect itself against suits like this in the course of contracting with strike replacements.[9] Its risk

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strike, state that an employer has a legal right to replace economic strikers at will. We construe these cases as holding that the motive for such replacements is immaterial, absent evidence of an independent unlawful purpose. Therefore, we reject the Trial Examiner's conclusion that the plan to replace the economic strikers here was itself improper and that the strike was converted to an unfair labor practice strike on January 4 by Respondent's implementation of such plan."

The Board noted its holding in *Hot Shoppes, Inc.*, in its Twenty-Ninth Annual Report of the National Labor Relations Board 29 (1964), and the holding has not been repudiated by the Board. See, *e. g.*, *Pennsylvania Glass Sand Corp.*, 172 N. L. R. B. 514, n. 3, 535 (1968). There are no cases in this Court that require a different conclusion. Indeed, as indicated above, in *Hot Shoppes, Inc.*, *supra*, the Board read *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1938), as holding that the motive for hiring permanent replacements is irrelevant. *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221 (1963), cited by JUSTICE BLACKMUN, involved an offer of superseniority to replacements. The opinion was careful to distinguish cases not involving that element. *Id.*, at 232.

JUSTICE BLACKMUN also suggests that the Board has held that employment conditioned on the employer's settling with the union is not a permanent employment arrangement and that we should defer to the Board. But the Board's position in this Court is equivocal at best: "[S]uch a conditional offer *might well* render the replacements only temporary hires . . . ." (Emphasis added.) NLRB Br., at 17. This case is thus a far cry from *NLRB* v. *Transportation Management, Inc.*, 462 U. S. 393 (1983), where we were reviewing a clear rule of the Board. Here there is no firm position of the Board that deserves deference. *Covington Furniture Mfg. Corp.*, 212 N. L. R. B. 214 (1974), enf'd, 514 F. 2d 995 (CA6 1975), is not to the contrary. There the replacements could be fired at the will of the employer for any reason; the employer would violate no promise made to a replacement if it discharged some of them to make way for returning strikers, even if the employer was not required to do so by the terms of a settlement with the union. Of course, in the end, JUSTICE BLACKMUN does not defer to, but rejects, the position of the Board that respondents' suit is pre-empted by the NLRA.

[9] If, as we hold, an employer may condition its offer to replacements and hence avoid conflicting obligations to strikers and replacements in the

of liability if it discharges replacements pursuant to a settlement or to a Board order would then be minimal. We fail to understand why in such circumstances the employer would be any less willing to settle the strike than it would be under the regime proposed by Belknap and the Board, which as a matter of law, would permit it to settle without liability for misrepresentation or for breach of contract.

Belknap and its supporters, the Board and the AFL–CIO, offer no substantial case authority for the proposition that the *Machinists* rationale forecloses this suit. Surely *Machinists* did not deal with solemn promises of permanent employment, made to innocent replacements, that the employer was free to make and keep under federal law. *J. I. Case Co.* v. *NLRB*, 321 U. S. 332 (1944), suggests that individual contracts of employment must give way to otherwise valid provisions of the collective-bargaining contract, *id.*, at 336–339, but it was careful to say that the Board "has no power to adjudicate the validity or effect of such contracts except as to their effect on matters within its jurisdiction," *id.*, at 340. There, the cease-and-desist order, as modified, stated that the discontinuance of the individual contracts was "without prejudice to the assertion of any legal rights the employee may have acquired under such contract or to any defenses thereto by the employer." *Id.*, at 342 (emphasis deleted); see n. 13, *infra*.

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event of a settlement providing for reinstatement, the employer will very likely do so. Hence, there will be little occasion for replacements to bring suits for breach of contract or misrepresentation. The employer that nevertheless makes unconditional commitments to replacements and wants to discharge them after settlement with the union will be in much the same position as the employer in *W. R. Grace & Co.* v. *Rubber Workers*, 461 U. S. 757 (1983). There the employer signed a conciliation agreement with the Equal Employment Opportunity Commission that conflicted with its collective-bargaining agreement with the union. We recognized the employer's dilemma, but because it was of the employer's own making we unanimously refused to relieve the employer of either obligation. *Id.*, at 770.

There is still another variant or refinement of the argument that the employer and the Union should be privileged to settle their dispute and provide for striker reinstatement free of burdensome lawsuits such as this. It is said that respondent replacements are employees within the bargaining unit, that the Union is the bargaining representative of petitioner's employees, and the replacements are thus bound by the terms of the settlement negotiated between the employer and "their" representative.[10] The argument is not only that as a matter of federal law the employer cannot be foreclosed from discharging the replacements pursuant to a contract with a bargaining agent, but also that by virtue of the agreement with the Union it is relieved from responding in damages for its knowing breach of contract—that is, that the contracts are not only not specifically enforceable but also may be breached free from liability for damages. We need not address the former issue—the issue of specific performance—since the respondents ask only damages. As to the damages issue, as we have said above, such an argument was rejected in *J. I. Case.*

If federal law forecloses this suit, more specific and persuasive reasons than those based on *Machinists* must be identified to support any such result. Belknap insists that the rationale of the *Garmon* decision, properly construed and applied, furnishes these reasons.

IV

The complaint issued by the Regional Director alleged that on or about February 1, Belknap unilaterally put into effect a 50¢-per-hour wage increase, that such action constituted unfair labor practices under §§ 8(a)(1), 8(a)(3), and 8(a)(5), and that the strike was prolonged by these violations. If these allegations could have been sustained, the strike would have been an unfair labor practice strike almost from the very start. From that time forward, Belknap's advertised offers of permanent employment to replacements would arguably have been unfair labor practices since they could be viewed as threats to refuse to reinstate unfair labor practice strikers. See *NLRB* v. *Laredo Coca Cola Bottling Co.*, 613 F. 2d 1338, 1341 (CA5), cert. denied, 449 U. S. 889 (1980).[11] Furthermore, if the strike had been an unfair labor practice strike, Belknap would have been forced to reinstate the strikers rather than keep replacements on the job. *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, 278 (1956). Belknap submits that its offers of permanent employment to respondents were therefore arguably unfair labor practices, the adjudication of which were within the exclusive jurisdiction of the Board, and that discharging respondents to make way for strikers was protected activity since it was no more than the federal law required in the event the unfair labor practices were proved.[12]

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[10] The AFL–CIO disavows this argument. It suggests that replacements are bound only by those agreements that a union makes, as the exclusive bargaining agent for the struck employer's workers, regarding the terms and conditions of employment for the employer's work force after the termination of the strike. Brief for AFL–CIO as *Amicus Curiae* 12, n. 4.

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[11] *Monahan Ford Corp.*, 157 N. L. R. B. 1034, 1045 (1966) (telegram asking unfair labor practice strikers to return to work or suffer replacement violative of § 8(a)(1) as a threat to striker's job tenure for engaging in concerted activity).

[12] The dissent makes the same ineffective argument, ineffective because it cannot explain in any convincing way why the breach, if required by federal law, should not be subject to a damages remedy. It is not easy to grasp why the employer who settles a purely economic strike (such as one in which no unfair labor practice charge is filed) and fires permanent replacements to make way for returning strikers could be made to respond in damages; yet the employer who violates the labor laws is for that reason insulated from damages liability when it discharges replacements to whom it has promised permanent employment. The dissent asserts that to subject the unfair labor practice employer to damages suits would cause intolerable confusion, but as we see it there would be no interference with the Board's authority to impose its remedy for violating the federal labor law. Performing that function neither requires nor suggests that the replace-

Respondents do not dispute that it was the Board's exclusive business to determine, one, whether Belknap's unilateral wage increase was an unfair labor practice, which would have converted the strike into an unfair labor practice strike that required the reinstatement of strikers, and, two, whether Belknap also committed unfair labor practices by offering permanent employment to respondents. They submit, however, that under our cases, properly read, their actions for fraud and breach of contract, are not pre-empted. We agree with respondents.

Under *Garmon*, a State may regulate conduct that is of only peripheral concern to the Act or that is so deeply rooted in local law that the courts should not assume that Congress intended to pre-empt the application of state law. In *Linn* v. *Plant Guard Workers*, 383 U. S. 53 (1966), we held that false and malicious statements in the course of a labor dispute were actionable under state law if injurious to reputation, even though such statements were in themselves unfair labor practices adjudicable by the Board. Likewise, in *Farmer* v. *Carpenters*, 430 U. S. 290 (1977), we held that the Act did not pre-empt a state action for intentionally inflicting emotional distress, even though a major part of the cause of ac-

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ments must be deprived of their remedy for breach of contract. See *supra*, at 500.

Of course, here there was no adjudication of an unfair practice. The employer settled short of that possible outcome. That action was *not* required by federal law. We do not share the dissent's apparent view that federal labor policy favoring settlement privileges the employer to make and break contracts with innocent third parties at will. Nor do we understand why the threat of liability to discharged replacements, in the event the employer loses the unfair labor practice case and discharges them, would deter the employer from settling with the Board where it thinks the unfair labor practice charge will be sustained. Settling would not increase its potential liability to replacements. It may be that the employer would prefer to settle even a case that it is quite confident it could win, but that is surely no reason to deprive the replacements of their contract. Nor in such a case do the equities favor the strikers over the replacements, who would be entitled to stay unless the employer has violated the federal law.

tion consisted of conduct that was arguably an unfair labor practice. Finally, in *Sears, Roebuck & Co.* v. *Carpenters*, 436 U. S. 180 (1978), we held that a state trespass action was permissible and not pre-empted, since the action concerned only the location of the picketing while the arguable unfair labor practice would focus on the object of the picketing. In that case, we emphasized that a critical inquiry in applying the *Garmon* rules, where the conduct at issue in the state litigation is said to be arguably prohibited by the Act and hence within the exclusive jurisdiction of the NLRB, is whether the controversy presented to the state court is identical with that which could be presented to the Board. There the state-court and Board controversies could not fairly be called identical. This is also the case here.

Belknap contends that the misrepresentation suit is pre-empted because it related to the offers and contracts for permanent employment, conduct that was part and parcel of an arguable unfair labor practice. It is true that whether the strike was an unfair labor practice strike and whether the offer to replacements was the kind of offer forbidden during such a dispute were matters for the Board. The focus of these determinations, however, would be on whether the rights of strikers were being infringed. Neither controversy would have anything in common with the question whether Belknap made misrepresentations to replacements that were actionable under state law. The Board would be concerned with the impact on strikers not with whether the employer deceived replacements. As in *Linn* v. *Plant Guard Workers, supra*, "the Board [will] not be ignored since its sanctions alone can adjust the equilibrium disturbed by an unfair labor practice." *Id.*, at 66. The strikers cannot secure reinstatement, or indeed any relief, by suing for misrepresentation in state court. The state courts in no way offer them an alternative forum for obtaining relief that the Board can provide. The same was true in *Sears* and *Farmer*. Hence, it appears to us that maintaining the misrepresentation action would not interfere with the Board's determination of matters within its jurisdiction and that such an action is of no more than peripheral concern to the Board and the federal law. At the same time, Kentucky surely has a substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm. It is no less true here than it was in *Linn* v. *Plant Guard Workers*, *supra*, at 63, that "[t]he injury" remedied by the state law "has no relevance to the Board's function" and that "[t]he Board can award no damages, impose no penalty, or give any other relief" to the plaintiffs in this case. The state interests involved in this case clearly outweigh any possible interference with the Board's function that may result from permitting the action for misrepresentation to proceed.

Neither can we accept the assertion that the breach-of-contract claim is pre-empted. The claimed breach is the discharge of respondents to make way for strikers, an action allegedly contrary to promises that were binding under state law. As we have said, respondents do not deny that had the strike been adjudicated an unfair labor practice strike Belknap would have been required to reinstate the strikers, an obligation that the State could not negate.[13] But respond-

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[13] Kentucky may not mandate specific performance of the contract between Belknap and respondents nor may it enter an injunction requiring the reinstatement of respondents as a remedy for fraud if either action necessitates the firing of a striker entitled to reinstatement. To do so would be to deprive returning strikers of jobs committed to them by the national labor laws. As the Court said in *National Licorice Co.* v. *NLRB*, 309 U. S. 350, 365 (1940):

"The effect of the Board's order, as we construe it, is to preclude the petitioner from taking any benefit of the contracts which were procured through violation of the Act and which are themselves continuing means of violating it, and from carrying out any of the contract provisions, the effect of which would be to infringe the rights guaranteed by the National Labor Relations Act. *It does not forclose the employees from taking any action to secure an adjudication upon the contracts, nor prejudge their rights in the event of such adjudication.* We do not now consider their nature and ents do assert that such an adjudication has not been made, that Belknap prevented such an adjudication by settling with the Union and voluntarily agreeing to reinstate strikers, and that, in any event, the reinstatement of strikers, even if ordered by the Board, would only prevent the specific performance of Belknap's promises to respondents, not immunize Belknap from responding in damages for its breach of its otherwise enforceable contracts.

For the most part, we agree with respondents. We have already concluded that the federal law does not expressly or impliedly privilege an employer, as part of a settlement with a union, to discharge replacements in breach of its promises of permanent employment. Also, even had there been no settlement and the Board had ordered reinstatement of what it held to be unfair labor practice strikers, the suit for damages for breach of contract could still be maintained without in any way prejudicing the jurisdiction of the Board or the interest of the federal law in insuring the replacement of strikers. The interests of the Board and the NLRA, on the one hand, and the interest of the State in providing a remedy to its citizens for breach of contract, on the other, are "discrete" concerns, cf. *Farmer* v. *Carpenters*, 430 U. S., at 304. We see no basis for holding that permitting the contract cause of action will conflict with the rights of either the strikers or the employer or would frustrate any policy of the federal labor laws.

V

Because neither the misrepresentation nor the breach-of-contract cause of action is pre-empted under *Garmon* or *Machinists*, the decision of the Kentucky Court of Appeals is

Affirmed.

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extent. It is sufficient to say here that it will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it." (Emphasis added.)

JUSTICE BLACKMUN, concurring in the judgment.

I

Earlier this month, the Court unanimously reaffirmed the principle that the National Labor Relations Board's construction of the National Labor Relations Act (NLRA), if reasonable, is entitled to deference from the courts. *NLRB* v. *Transportation Management, Inc.*, 462 U. S. 393, 402–403 (1983). The Court today, it seems to me, ignores this fundamental premise of federal labor law in order to conform the substance of the NLRA to the contract and tort laws of the Commonwealth of Kentucky. Having done so, the Court not surprisingly concludes that those state laws are not pre-empted by the refashioned NLRA. I cannot participate in this extraordinary approach to labor law pre-emption.

The Court recognizes that, "as the Board interprets the law, the employer must reinstate strikers at the conclusion of even a purely economic strike unless it has hired 'permanent' replacements, that is, hired in a manner that would 'show that the men [and women] who replaced the strikers were regarded by themselves and the [employer] as having received their jobs on a permanent basis.'" *Ante*, at 501, quoting *Georgia Highway Express, Inc.*, 165 N. L. R. B. 514, 516 (1967), aff'd *sub nom. Truck Drivers and Helpers Local 728* v. *NLRB*, 131 U. S. App. D. C. 195, 403 F. 2d 921, cert. denied, 393 U. S. 935 (1968). See *post*, at 540–541, n. 13 (dissenting opinion). The Court holds today, however, that the employer may refuse to reinstate strikers at the end of an economic strike if the employer has promised its strike replacements "permanent employment, *subject only to settlement with its employees' union* and to a Board unfair labor practice order," *ante*, at 503 (emphasis supplied)—in other words, if the employer has promised that the jobs are permanent unless it later decides they are temporary. Such a promise bears little resemblance to a promise of permanent employment. During settlement negotiations, the union can be counted on to demand reinstatement for returning strikers as a condition for any settlement; the employer can be counted on to acquiesce, at a price the union certainly will be willing to pay.[1]

In rejecting the Board's longstanding view of the Act, the Court does not pause to determine whether the Board's view is reasonable, or whether it is contrary to the statutory mandate or frustrates Congress' policy objectives. See *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U. S. 27, 32 (1981); *NLRB* v. *Brown*, 380 U. S. 278, 291 (1965). Rather, it adopts an approach that itself is at wide variance with the NLRA. Under the Act, an employer may eliminate economic strikers' jobs only by showing "'legitimate and substantial business justifications.'" *NLRB* v. *Fleetwood Trailer Co.*, 389 U. S. 375, 378 (1967), quoting *NLRB* v. *Great Dane Trailers, Inc.*, 388 U. S. 26, 34 (1967). As the Court recognizes, this rule flows from the Act's fundamental premise that economic strikers "retain their employee status and are entitled to reinstatement." *Ante*, at 503; see *post*, at 525–527 (dissenting opinion). The employer may refuse reinstatement if it has promised permanent employment to replacements. But this is true only because such promises are deemed necessary to serve the employer's legitimate and substantial business justification in seeking "to protect and continue his business by supplying places left vacant" by the strikers. *NLRB* v. *Mackay Co.*, 304 U. S. 333, 345 (1938).

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[1] The Court's suggestion that the employer's conditional promise "is of great moment if the employer is not found guilty of unfair practices, does not settle with the union, or settles without a promise to reinstate," *ante*, at 503, ignores the significant fact that this is the one situation for which a strike replacement would not need reassurances. An employer that refuses to reinstate strikers as a part of a strike settlement, when it could have demanded concessions from the union in exchange, is unlikely to fire the replacements and reinstate strikers unilaterally. The Court's conditional promise does not relate to potential replacements' concerns—that in order to end the strike, the employer will agree with the union to reinstate the strikers at the replacements' expense.

See *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 232 (1963). The Board reasonably has concluded that this purpose is served only by a promise that the job is not subject to cancellation at the employer's option. *Covington Furniture Mfg. Corp.*, 212 N. L. R. B. 214, 220 (1974), enf'd, 514 F. 2d 995 (CA6 1975).[2] It is patently unreasonable to suppose that the promise the Court substitutes—that the replacements are permanent unless the employer decides otherwise—would further the employer's legitimate goal at all. It is in order to allay the potential replacements' fear that the employer will replace them as part of a settlement with the union that the employer must make the promise in the first place.

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[2] As the Court's own quotation from *Hot Shoppes, Inc.*, 146 N. L. R. B. 802 (1964), demonstrates, *ante*, at 504–505, n. 8, that case is not to the contrary. *Hot Shoppes* merely holds that, in order to retain strike replacements, the employer need not show in a given case that its offers of permanent employment were motivated by the need to continue the operation of its business. As *Mackay Co.* makes clear, the Act gives the employer the right to make such promises because it is presumed that they serve this purpose, 304 U. S., at 345; the specific motive for a particular offer is irrelevant. In *Hot Shoppes*, as in this case, permanent offers were made. 146 N. L. R. B., at 804. *Hot Shoppes* obviously does not stand for the proposition that an employer *not* making an offer of permanent employment in the manner set forth in *Covington Furniture* may retain replacement employees in preference to strikers. Yet that is what the Court holds today.

The Court also quotes incompletely from the Board's brief in this Court in an effort to demonstrate that the Board's position is "equivocal at best," and therefore not entitled to deference. *Ante*, at 505, n. 8. The full quote is as follows, and is very clear:

"An employer *could not escape the dilemma* posed by the threat of a state court fraud action simply by informing prospective replacements of all the contingencies that might affect their tenure. In the first place, if an employer were to extend only such a conditional offer, its ability to hire replacement workers quickly would be diminished and its chief weapon for combatting the employees' strike pressure would consequently be weakened. Furthermore, such a conditional offer might well render the replacements only temporary hires *and would mean that the employer would be obligated to reinstate the strikers even if the strike turned out to be an economic one. . . .*" Brief for NLRB as *Amicus Curiae* 17 (emphasis supplied).

Indeed, an employer who makes a conditional promise has no legitimate, much less substantial, business justification to refuse to agree with the union to reinstate the strikers. Under the Court's scenario, the employer has managed to operate its business by hiring replacements on the understanding that they may be fired as part of a settlement of the strike. And whether or not state contract and tort remedies are pre-empted by the Act, the employer can agree to reinstate the strikers at the replacements' expense without incurring liability. The Court's convoluted attempt to establish that its conditional promise would serve some legitimate business purpose, see *ante*, at 503–504, and n. 8, fails to come to grips with these simple facts.

The Court's conditional promise achieves only one thing: it permits an employer, during settlement negotiations with the union, to threaten to retain replacement employees in preference to returning strikers despite the fact that the employer has not promised to do so. The naked interest in making such a threat, silently endorsed in the Court's opinion, could not be less legitimate under the NLRA. From the employer's point of view, one benefit of offering strike replacements permanent employment is that strikers become fearful that they will lose their jobs. But it is clear that creating this fear, which discourages union membership and concerted activities, is a deleterious side effect of, rather than a legitimate business justification for, the power to hire permanent strike replacements. See *NLRB* v. *Erie Resistor Corp.*, 373 U. S., at 232. Promises of permanent employment, and subsequent retention of replacements, are permitted only because it is believed that the harm to protected activities is outweighed by the employer's interest in operating its plant during a strike. *Ibid.* Thus, an employer who succeeds in operating the plant without promising permanent employment would have no legitimate basis for not reinstating economic strikers. In my view, having made only the Court's conditional promise, an employer who threatened during strike negotiations to retain strike replacements in preference to economic strikers would commit an unfair labor practice. See 29 U. S. C. §§ 158(a)(1) and (3); cf. *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 618–620 (1969) (employer may predict adverse consequences of concerted activities flowing from "economic necessities" they engender, but may not make a "threat of reprisal" for engaging in concerted activities); *NLRB* v. *Fleetwood Trailer Co.*, 389 U. S., at 378 (unjustified refusal to reinstate strikers at end of economic strike is unfair labor practice because it discourages excercise of right to strike).

The Board's construction of the Act is reasonable and entitled to a deference that is wholly lacking in the Court's opinion. By brushing aside the Board's interpretation of the Act, and substituting its own novel construction, the Court sidesteps the real question in what is, as the dissent observes, *post*, at 523, "a difficult case." The question presented is whether respondents' state contract and tort actions are pre-empted by the Act, not whether the Act can be manipulated into a posture consistent with such lawsuits. Taking federal law as it is, however, while the question is close, I conclude that neither of respondents' causes of action is pre-empted.[3]

II

A

I cannot easily dismiss the basic premises underlying either the Court's opinion or the dissenting opinion. On the one hand, the dissent aptly observes that respondents' state-law claims "go to the core of federal labor policy." *Post*, at 524. One would not expect that Congress would have left anything so basic as the respective rights and duties of strike replacements and employers to the nonuniform regulation of the States. Cf. *New York Tel. Co.* v. *New York State Labor Dept.*, 440 U. S. 519, 549 (1979) (concurring opinion). On the other hand, there is great strength in the bedrock of the Court's position—it is difficult to believe that Congress could have intended to permit employers and unions "to injure innocent third parties without regard to the normal rules of law governing those relationships." *Ante*, at 500.

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[3] This Court, and not the Board, reviews state-court lawsuits said to conflict with federal law. Although it is well established that the Board's construction of the substantive scope of the NLRA is due deference, I am unaware of any case in which this Court has deferred to the Board's views on pre-emption. Cf. *ante*, at 505, n. 8.

Any attempt to reconcile these concerns, in my view, must begin with an analysis of the nature of the economic weapon at issue. The heart of the weapon is the power to hire replacements. The promise of permanent employment is simply one means of achieving this end, a means that unquestionably is permitted by the NLRA. The dissent appears to view the self-help weapon as the power to make such promises, and concludes that Congress intended that this power would be largely unregulated. See *post*, at 536–538. The Court appears to take a different view of the nature of the weapon, implying that the weapon properly is seen as the power to contract with replacement employees, not merely to promise permanent jobs, and that the normal state-law accompaniments of contracts were contemplated and accepted by Congress. See *ante*, at 500, 512.

I believe that the Court's view is more consistent with the purposes and qualities of this particular economic weapon. One may agree with the dissent that permitting employers to hire replacement workers "is part of the balance struck by the Act between labor and management," *post*, at 536, without conceding that all means of accomplishing this were meant to be unregulated. As noted above, the very purpose of enabling an employer to offer permanent employment to strike replacements is to permit the employer to keep its business running during a strike. If the promises of permanent employment are unenforceable, "many putative replacements would know that the proffered job is, in important respects, nonpermanent and [might] not accept employment for that reason." *Ante*, at 502. The dissent's view that federal law intends those offers to be nonbinding would undermine the reason for permitting them. If the promises are enforceable under state law, however, they are credible; this is the only result consistent with the promises' federal purpose.

Moreover, it is difficult to explain the employer's power to prefer permanent strike replacements over returning economic strikers unless, through the promise of permanent employment, the employer has incurred an obligation to those replacements. The employer makes offers of permanent employment to induce replacement workers to take jobs. But what is the legitimate and substantial business justification for later refusing to reinstate returning strikers if, as a matter of federal law, the employer is entitled to discharge the replacements in derogation of its promises to them? This power to override the economic strikers' statutory entitlement to reinstatement must be based on the common-sense notion that, in order to continue to operate the business, the employer was required to obligate itself to third parties in a manner inconsistent with the strikers' right to subsequent reinstatement. Certainly, avoidance of liability for breach of contract is a legitimate business objective. Because federal law apparently does not obligate the employer to fulfill its promises to the replacements, it must be the typical state-law obligation to honor one's commitments that justifies the employer's disregard for the returning strikers' otherwise paramount statutory entitlement.

B

Because this case does not fit comfortably within labor preemption doctrine as heretofore developed by this Court, see *post*, at 523–524, 530, and n. 2 (dissenting opinion), and because I share the Court's doubt that Congress could have intended to deprive strike replacements of any remedy for obvious wrongs, the considerations noted above lead me to affirm the judgment below, despite the complex problems identified in the dissent. Cf. *New York Tel. Co.* v. *New York State Labor Dept.*, 440 U. S., at 549 (concurring opinion) (evidence indicated that Congress decided to tolerate interference with labor law policies caused by unemployment insurance laws). I am not persuaded by the dissent's argument that the *Machinists* doctrine bars respondents' causes of action, for I do not believe that "Congress intended that the conduct involved be unregulated because left 'to be controlled by the free play of economic forces.'" *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132, 140 (1976), quoting *NLRB* v. *Nash-Finch Co.*, 404 U. S. 138, 144 (1971). Unlike the self-help weapon at issue in *Machinists*, promising permanent employment to strike replacements involves offering to obligate oneself to third parties and inducing their reliance on that offer. In *Machinists*, the union's refusal to work overtime did not involve the rights and duties of anyone but the union and the employer.[4]

The dissent's suggestion that a state action for misrepresentation would frustrate the policies of the Act by making employers more hesitant to promise permanent employment,

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[4] The right to hire replacements during a strike also differs from the self-help weapon at issue in *Teamsters* v. *Morton*, 377 U. S. 252 (1964), where Congress had proscribed specific types of secondary boycotts, but not the type of boycott there at issue. *Id.*, at 258–260. Had Congress "focused upon," *id.*, at 261, the power to hire strike replacements and made clear, by omission, that strike replacements were to be left without a remedy for breach of contract or deliberate misrepresentation, these actions would be pre-empted. There is no evidence, however, that Congress focused on this question. Absent congressional attention, the Court must construe the Act and determine its impact on state law in light of the wider contours of federal labor policy. In this case, it appears to me that state enforcement of promises of permanent employment through damages awards for breach of contract and misrepresentation is consistent with the nature of the federal weapon itself.

post, at 536–538, assumes that under the federal scheme the employer is not meant to hesitate. But I believe that the hesitation engendered by potential contract damages and damages for misrepresentation is as consistent with federal law as it is with common sense and decency. The "free play of economic forces" contemplated by *Machinists* is the clash of weapons used by employer and union against one another. The free play of economic forces does not control one party's pursuit of its goals through imposition of harms on persons external to the dispute, because the economic contest creates no incentive for the other party to impose sanctions for such conduct. In the absence of protection for third parties' rights, the free play of economic forces actually is distorted; the economic cost of a weapon is understated.[5]

Much more troubling is the dissent's argument that the state-law action will discourage the settlement of strikes. *Post,* at 532–533. I agree that, where the employer has chosen to promise permanent employment to strike replacements, its potential liability to them would make the employer reluctant to settle by giving the strikers their old jobs. This problem, it seems to me, is inherent in Congress' choice to permit employers to offer permanent employment in order to obtain replacements. The potential dilemma is one the employer must consider at the time it chooses whether to promise permanent employment. If it makes no promises, settlement will not be impeded.[6]

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[5] In some circumstances, Congress has permitted parties to a labor dispute to impose harm on third parties with impunity. See, *e. g.*, *Teamsters* v. *Morton*, 377 U. S. 252 (1964). But when Congress has granted such permission, it has done so with care. See n. 4, *supra.*

[6] It is noteworthy, in light of the argument that permitting these state actions violates the rule in *Machinists*, that neither the Board nor the AFL–CIO can explain in whose favor such actions tip the collective-bargaining process. See Brief for NLRB as *Amicus Curiae* 18–19; Brief for AFL–CIO as *Amicus Curiae* 4–5. "Permanent" strike replacements will have certain rights, but employers will hesitate to make permanent

Finally, I cannot agree that the doctrine of *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), pre-empts respondents' contract action. Of course, if the strike is an unfair labor practice strike and the employer has offered permanent employment to the replacements, federal labor law requires the employer to dismiss the replacements in derogation of his promise. As the dissent implicitly concedes, however, see *post*, at 530–531, n. 2, that conduct is "arguably required" does not necessarily mean it is "arguably protected" within the meaning of *Garmon*. Federal law did not require the employer to make the promise or to commit unfair labor practices. Moreover, as discussed above, once the promises are made and relied upon, I believe that federal law presumes they are in some manner enforceable. If federal law recognizes that the employer voluntarily has undertaken an obligation to the replacements, the fact that the employer commits an unfair labor practice making it impossible for it to fulfill that obligation should not shield the employer from compensating the replacement employees. Cf. *W. R. Grace & Co.* v. *Rubber Workers*, 461 U. S. 757 (1983).

III

I fully recognize that this view may appear to put the employer between Scylla and Charybdis. Neither the Court's approach, nor the dissent's, however, provides the employer with a safer harbor. The Court's concept of a conditional promise will not help the employer attract replacements, and if the employer wishes to make a meaningful promise, the Court's opinion leaves the employer just where my approach

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offers; this hesitancy will redound to the benefit of striking unions, but those employers who do make such promises will hesitate to settle with the union on terms involving return of the strikers. And while the fact that the employer's offers of permanent employment are legally meaningful will make them credible, thereby improving the employer's ability to attract replacement workers during an economic strike, it also will make the offers more costly, and therefore less attractive, for the employer.

would. And by draining all legal meaning from the promise of permanence, the dissent's approach leaves employers unable to attract any but the most gullible and unfortunate of potential replacement employees.

Although I cannot believe that Congress has reconciled the conflict between the striker's right to reinstatement and the employer's right to operate its business during a strike by requiring lies and broken promises to strike replacements to go unredressed, Congress certainly is free to prove me wrong. Congress also is free to resolve the great tensions inherent in this complex three-way struggle entirely within the framework of federal law. Certainly, some form of federal regulation of promises of permanent employment is the most desirable solution to the perplexing problem before the Court, because it would provide both consistency within federal labor law itself and uniformity throughout the Nation. At this time, however, it appears to me that the logic of the Act permits respondents' damages actions.

Accordingly, I concur in the judgment of the Court.

Justice Brennan, with whom Justice Marshall and Justice Powell join, dissenting.

In some respects, this is a difficult case. Pre-emption cases in the labor law area are often difficult because we must decide the questions presented without any clear guidance from Congress. See *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 286, 289 (1971); *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 240–242 (1959); *Garner* v. *Teamsters*, 346 U. S. 485, 488 (1953). We have developed standards to assist us in our task, see *e. g.*, *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132 (1976); *Garmon*, *supra*, but those standards are by necessity general ones which may not provide as much assistance as we would like in particular cases. This is especially true when the case is an unusual one. We are not confronted here with a suit between an employer and a union, see *e. g.*, *Sears*, *Roebuck & Co.* v. *Carpenters*, 436 U. S. 180 (1978); *Machinists, supra; Garmon, supra*, or with one between a union and one of its members, see, *e. g.*, *Farmer* v. *Carpenters*, 430 U. S. 290 (1977); *Lockridge, supra; Plumbers* v. *Borden*, 373 U. S. 690 (1963). Such suits are common and have provided the vehicles for developing the standards we have established in this area. Rather, we have here a suit brought by former employees of petitioner who allegedly were hired as permanent replacements for striking union members. Our prior cases, therefore, provide little guidance in this novel area.

Despite the conceded difficulty of this case, I cannot agree with the Court's conclusion that neither respondents' breach-of-contract claim nor their misrepresentation claim is preempted by federal law. See *ante*, at 512. In my view these claims go to the core of federal labor policy. If respondents are allowed to pursue their claims in state court, employers will be subject to potentially conflicting state and federal regulation of their activities; the efficient administration of the National Labor Relations Act will be threatened; and the structure of the economic weapons Congress has provided to parties to a labor dispute will be altered. In short, the purposes and policies of federal law will be frustrated. I, therefore, respectfully dissent.

I

In *NLRB* v. *American Ins. Co.*, 343 U. S. 395 (1952), the Court stated that "[t]he National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers." *Id.*, at 401–402 (footnote omitted). This process of "ordering and adjusting" competing employer and employee interests has been aptly described as "the keystone of the federal scheme to promote industrial peace." *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95, 104 (1962). An integral part of this process is the use of economic pressure by both employers and unions to achieve bargaining goals. As the Court stated in *NLRB* v. *Insurance Agents*, 361 U. S.

477 (1960): "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *Id.*, at 489.

A union's most important economic weapon is the strike. "The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms . . . ." *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 181 (1967). A strike is protected activity under § 7 of the Act, 29 U. S. C. § 157, and the right to strike is expressly recognized in § 13, 29 U. S. C. § 163. See *NLRB* v. *Fleetwood Trailer Co.*, 389 U. S. 375, 378 (1967); *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 233 (1963); *NLRB* v. *Rice Milling Co.*, 341 U. S. 665, 672–673 (1951). Moreover, § 2(3) of the Act, 29 U. S. C. § 152(3), "preserves to strikers their unfilled positions and status as employees during the pendency of a strike." *Erie Resistor Corp.*, *supra*, at 233. See also *Fleetwood Trailer Co.*, *supra*, at 378; *NLRB* v. *Mackay Co.*, 304 U. S. 333, 345 (1938). "This . . . solicitude for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system." *Erie Resistor Corp.*, *supra*, at 233–234.

Employers also have lawful economic weapons at their disposal. See *NLRB* v. *Brown*, 380 U. S. 278 (1965); *American Ship Building Co.* v. *NLRB*, 380 U. S. 300 (1965); *NLRB* v. *Truck Drivers*, 353 U. S. 87 (1957). Among these weapons is one of particular relevance to this case: the right to hire replacements for striking employees. See *NLRB* v. *Mackay Co.*, *supra*, at 345–347.

A variety of rules have been developed regarding the use of economic weapons by employers and unions. As noted, if an employee decides to strike he does not lose his status as an employee. If he offers to return to work at the end of an economic strike, the employer must reinstate him. *Fleet-*

wood Trailer Co., supra, at 378. A refusal by the employer to reinstate the employee constitutes an unfair labor practice under §§ 8(a)(1) and 8(a)(3), 29 U. S. C. §§ 158(a)(1) and (a)(3), unless the employer can show that his action is supported by "'legitimate and substantial business justifications.'" *Fleetwood Trailer Co., supra,* at 378, quoting *NLRB* v. *Great Dane Trailers, Inc.*, 388 U. S. 26, 34 (1967).

One such justification arises within the context of an economic strike when "the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations." *Fleetwood Trailer Co., supra,* at 379. In *NLRB* v. *Mackay Co., supra,* the Court recognized that an employer may replace striking employees in an effort to carry on his business. 304 U. S., at 345. The employees' right to strike does not deprive the employer of his "right to protect and continue his business by supplying places left vacant by strikers." *Ibid.* If the employer replaces the strikers, "he is not bound to discharge [the replacements] upon the election of [the strikers] to resume their employment. . . ." *Id.*, at 345–346. "[T]he employer's interest [in continuing operations] must be deemed to outweigh the damage to concerted activities caused by permanently replacing strikers. . . ." *Erie Resistor Corp., supra,* at 232. The burden of proving the existence of this justification, however, is on the employer. *Fleetwood Trailer Co., supra,* at 378. In this regard, the employer must prove that the workers hired to replace the strikers have been hired as permanent employees. See, *e. g.*, *NLRB* v. *Mars Sales & Equipment Co.*, 626 F. 2d 567, 572 (CA7 1980); *NLRB* v. *Murray Products, Inc.*, 584 F. 2d 934, 938–939 (CA9 1978). In *Mars Sales & Equipment Co.*, the Court of Appeals stated:

> "The replacements must be permanent at the time of the discharge . . . or the discharge and refusal to reinstate constitute an unfair labor practice. . . . If an employer hires replacements without a commitment or under-

> standing that the job is permanent and also discharges the strikers, the interest in protecting economic strikers by an entitlement to reinstatement is not overcome by a substantial business justification. The employer has not had to offer the jobs on a permanent basis as an inducement to continuing his operations. Hence, an economic striker whose job has not been permanently promised to a replacement at the time the striking employee is discharged is entitled to reinstatement." 626 F. 2d, at 572–573.

See also *International Assn. of M. & A. W., Dist. No. 8* v. *J. L. Clark Co.*, 471 F. 2d 694, 696, 698 (CA7 1972). See generally *H. & F. Binch Co. Plant of Native Laces, Inc.* v. *NLRB*, 456 F. 2d 357 (CA2 1972); *C. H. Guenther & Son, Inc.* v. *NLRB*, 427 F. 2d 983 (CA5 1970).

A different set of rules applies if employees have decided to strike in response to employer unfair labor practices. Under these circumstances, "the striking employees do not lose their status and are entitled to reinstatement with back pay, even if replacements for them have been made." *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, 278 (1956) (footnote omitted). "Failure of the Board to enjoin [the employer's] illegal conduct or failure of the Board to sustain the right to strike against that conduct would seriously undermine the primary objectives of the Labor Act." *Ibid.* See *Fleetwood Trailer Co., supra*, at 379, n. 5; *NLRB* v. *Top Mfg. Co., Inc.*, 594 F. 2d 223, 225 (CA9 1979).

These rules are the product of the "delicate task . . . of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct." *Erie Resistor Corp., supra*, at 229 (footnotes omitted). See also *NLRB* v. *Truck Drivers, supra*, at 96. The questions presented by this case cannot be addressed, or answered correctly, without due regard for the existence of these rules and the sensitivity of the process that produced them.

II

Respondents' breach-of-contract claim is based on the allegation that petitioner breached its contracts with them by entering into a settlement agreement with the union that called for the gradual reinstatement of the strikers respondents had replaced. See App. 3a–5a. The strike involved in this case, however, arguably was converted into an unfair labor practice strike almost immediately after it started. See *ante*, at 494–495, 507–508. If the strike was converted into an unfair labor practice strike, the striking employees were entitled to reinstatement irrespective of petitioner's decision to hire permanent replacements. See *NLRB* v. *Johnson Sheet Metal, Inc.*, 442 F. 2d 1056, 1061 (CA10 1971); *Philip Carey Mfg. Co.* v. *NLRB*, 331 F. 2d 720, 728–729 (CA6 1964). See also *Fleetwood Trailer Co.*, 389 U. S., at 379, n. 5; *Mastro Plastics Corp.*, *supra*, at 278; *supra*, at 527. Under these circumstances, federal law would have required petitioner to reinstate the striking employees and to discharge the replacements. In this light, it is clear that petitioner's decision to breach its contracts with respondents was arguably *required* by federal law.

In *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274 (1971), the Court stated that "[t]he constitutional principles of pre-emption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter." *Id.*, at 285–286. In this regard, "[i]t is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." *Id.*, at 292. In *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), the Court stated that "[i]n determining the extent to which state regulation must yield to subordinating federal authority, we have been concerned with delimiting areas of potential conflict; potential conflict of rules of law, of remedy, and of administration." *Id.*, at 241–242. The Court later noted that "[w]hen the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting." *Id.*, at 243 (footnote omitted).[1] See also *Vaca* v. *Sipes*, 386 U. S. 171, 178–179 (1967) ("[T]he broad powers conferred by Congress upon the National Labor Relations Board to interpret and to enforce the complex Labor Management Relations Act . . . necessarily imply that potentially conflicting 'rules of law, of remedy, and of administration' cannot be permitted to operate").

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[1] The Court went on to state, however, that considerations of federalism have "required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . [o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to Act." 359 U. S., at 243–244 (footnote omitted).

The Court established the following standard:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes." *Id.*, at 244 (footnote omitted).

See also *id.*, at 245 ("When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted").

In my view, these basic principles compel a conclusion that respondents' breach-of-contract claim is pre-empted. The potential for conflicting regulation clearly exists in this case. Respondents' breach-of-contract claim seeks to regulate activity that may well have been required by federal law. Petitioner may have to answer in damages for taking such an action. This sort of conflicting regulation is intolerable. As the Court stated in *Motor Coach Employees* v. *Lockridge*, *supra*, if "the regulatory schemes, state and federal, conflict . . . pre-emption is clearly called for. . . ." 403 U. S., at 292.[2]

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[2] The "arguably required" activity at issue in this case is not covered explicitly by *Garmon*'s "arguably protected, arguably prohibited" standard. See 359 U. S., at 244–245; n. 1, *supra*. *Garmon* focused on the need to protect the Board's primary jurisdiction in order to avoid, among other things, conflicting interpretations of federal law. See *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132, 138–139 (1976). But the pre-emption of state-law claims based on activity arguably required by federal law must be seen as implicit in, and as flowing logically from, *Garmon*. If there is a need to protect the primary jurisdiction of the Board to avoid conflicting interpretations of federal law, then certainly there is an even greater need to pre-empt conflicting state regulation of activity that an employer might be required to pursue by the Board. The need to pre-empt conflicting state regulation of arguably required activity follows *a fortiori* from the arguably protected branch of *Garmon*.

I do not share the Court's apparent belief that the character of any given strike can be predicted with anything approaching certainty. See *ante*, at 508–509, n. 12. As the Board points out: "Whether a particular strike is an economic strike or an unfair labor practice strike . . . is often unclear until the strike has ended. Where the character of a strike is contested, as it frequently is, the issue must be resolved in an unfair labor practice proceeding before the Board." Brief for NLRB as *Amicus Curiae* 12. See also *id.*, at 12, n. 5. As noted, *supra*, at 528–529, the relevant concern is with "potential" conflict. See, *e. g.*, *Garmon*, 359 U. S., at 242. In *Garmon*, the Court stated:

> "The nature of the judicial process precludes an *ad hoc* inquiry into the special problems of labor-management relations involved in a particular set of occurrences in order to ascertain the precise nature and degree of federal-state conflict there involved, and more particularly what exact mischief

The Court recognizes that "had the strike been adjudicated an unfair labor practice strike, [petitioner] would have been required to reinstate the strikers . . . ." *Ante*, at 511. The Court concedes that the State "could not negate" this obligation, *ibid.*, and states that the contracts at issue here could not be specifically enforced. *Ante*, at 511–512, n. 13. "To do so would be to deprive returning strikers of jobs committed to them by the national labor laws." *Ibid.* In the Court's view, however, "even had there been no settlement and the Board had ordered reinstatement of what it held to be unfair labor practice strikers, the suit for damages for breach of contract could still be maintained without in any way prejudicing the jurisdiction of the Board or the interest of the federal law in insuring the replacement of strikers." *Ante*, at 512.[3]

Prohibiting specific enforcement, but permitting a damages award, does nothing to eliminate the conflict between state and federal law in this context. The Court fails to rec-

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such a conflict would cause. Nor is it our business to attempt this. Such determinations inevitably depend upon judgments on the impact of these particular conflicts on the entire scheme of federal labor policy and administration. Our task is confined to dealing with classes of situations. To the National Labor Relations Board and to Congress must be left those precise and closely limited demarcations that can be adequately fashioned only by legislation and administration." *Ibid.*

[3] In reaching this conclusion, the Court also appears to rely on language in *National Licorice Co.* v. *NLRB*, 309 U. S. 350 (1940), to the effect that a Board order prohibiting an employer from taking advantage of contracts procured in violation of the National Labor Relations Act did not foreclose employees "from taking any action to secure an adjudication upon the contracts. . . ." *Id.*, at 365. See *ante*, at 511–512, n. 13.

National Licorice Co. addressed the validity under federal law of contracts obtained by the employer through negotiations with an employee organization dominated by the employer. See 309 U. S., at 359–361. The case also addressed the scope of the Board's remedial powers. *Id.*, at 361–367. The Court in *National Licorice Co.* did not consider whether suits that might be brought by the employees in state court would be preempted by federal law.

ognize that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *Garmon*, 359 U. S., at 247. "The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Ibid.* The force of these observations is apparent in this case. If an employer is confronted with potential liability for discharging workers he has hired to replace striking employees, he is likely to be much less willing to enter into a settlement agreement calling for the dismissal of unfair labor practice charges and for the reinstatement of strikers. Instead, he is much more likely to refuse to settle and to litigate the charges at issue while retaining the replacements.[4] Such developments would frustrate the strong federal interest in ending strikes and in settling labor disputes.[5] In addition,

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[4] I do not share the Court's apparent view, see *ante*, at 508–509, n. 12, that the outcome of all unfair labor practice proceedings can be predicted with any confidence. See, *e. g.*, Brief for NLRB as *Amicus Curiae* 12, n. 5. In any event, the important point is that the threat of potential liability to replacements is likely to deter an employer from settling in any case in which the unfair labor practice charges provide him with the chance to present a strong, or perhaps even a colorable, defense.

[5] In this regard, it is important to keep in mind that strike settlement negotiations are part of the collective-bargaining process. As the Court stated in *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962), "[s]tate law which frustrates the effort of Congress to stimulate the smooth functioning of [the collective-bargaining] process . . . strikes at the very core of federal labor policy." *Id.*, at 104.

Moreover, it is a legitimate bargaining demand for a union to seek reinstatement of strikers in preference to replacements. See *Portland Stereotypers' Union No. 48*, 137 N. L. R. B. 782, 786 (1962).

We recognized the importance of strike settlement agreements in *Retail Clerks* v. *Lion Dry Goods, Inc.*, 369 U. S. 17 (1962), when we noted that the settlement agreement involved in that case was "an agreement between employers and labor organizations significant to the maintenance of labor peace between them." *Id.*, at 28. The Court went on to state:

"[The agreement] came into being as a means satisfactory to both sides for terminating a protracted strike and labor dispute. Its terms affect the

the National Labor Relations Board has suggested that any impediment to the settlement of unfair labor practice charges would have a serious adverse effect on the Board's administration of the Act. Brief for NLRB as *Amicus Curiae* 13, n. 6.[6] Finally, any obstacle to strike settlement agreements clearly affects adversely the interest of striking employees in returning to work, to say nothing of the public interest in ending labor strife. Consideration of these factors leads to the clear conclusion that respondents' breach-of-contract claim must be pre-empted.[7]

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working conditions of the employees of both respondents. It effected the end of picketing and resort by the labor organizations to other economic weapons, and restored strikers to their jobs. It resolved a controversy arising out of, and importantly and directly affecting, the employment relationship." *Ibid.*

Strike settlement agreements are enforceable under § 301(a) of the Labor Management Relations Act, 29 U. S. C. § 185(a). As we stated in *Lion Dry Goods*, "[i]f this kind of strike settlement were not enforceable under § 301(a), responsible and stable labor relations would suffer, and the attainment of the labor policy objective of minimizing disruption of interstate commerce would be made more difficult." 369 U. S., at 27.

[6] The Board states: "Over 82% of Board unfair labor practice complaints are resolved through settlement. Since the Board issues nearly 8,000 complaints a year, its regulatory mission would be frustrated by any impediments to settlements." Brief for NLRB as *Amicus Curiae* 13, n. 6.

[7] Even assuming that such analysis is necessary, this claim clearly does not fall within the exceptions to the pre-emption doctrine described in *Garmon*. See n. 1, *supra*. The claim at issue here hardly can be said to relate to activity that is "a merely peripheral concern of the . . . Act." *Garmon*, 359 U. S., at 243. Moreover, the conduct at issue here does not touch "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Id.*, at 244 (footnote omitted). In this regard, this case is readily distinguishable from cases like *Farmer* v. *Carpenters*, 430 U. S. 290 (1977), and *Linn* v. *Plant Guard Workers*, 383 U. S. 53 (1966). The breach-of-contract claim is not based on " 'intimidation and threats of violence' affect[ing] such compelling state interests as to permit the exercise of state jurisdiction." *Linn*, 383 U. S., at 62. Nor does the claim involve malicious libel, see *ibid.*, or the

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Respondents' misrepresentation claim stands on a somewhat different footing than their breach-of-contract claim. There is no sense in which it can be said that federal law required petitioner to misrepresent to respondents the terms on which they were hired. Permitting respondents to pursue their misrepresentation claim in state court, therefore, does not present the same potential for directly conflicting regulation of employer activity as permitting respondents to pursue their breach-of-contract claim. Nor can it be said that petitioner's alleged misrepresentation was "arguably protected" under *Garmon*. While it is arguable that petitioner's alleged offers of permanent employment were prohibited by the Act and therefore pre-empted under *Garmon*, see n. 1, *supra*, careful analysis yields the conclusion that this is not a sufficient ground for pre-empting respondents' misrepresentation claim.[8] In my view, however, respondents' misrepresentation claim is pre-empted under the analysis articulated principally in *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132 (1976).

The pre-emption doctrine described in *Machinists* finds its roots in *Garner* v. *Teamsters*, 346 U. S. 485 (1953), and in

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intentional infliction of emotional distress resulting from conduct "so outrageous that 'no reasonable man in a civilized society should be expected to endure it.'" *Farmer*, *supra*, at 302.

[8] If this strike was converted into an unfair labor practice strike almost immediately after it started, see *ante*, at 494–495, 507–508; *supra*, at 528, petitioner's offers of permanent employment to replacements may have constituted additional unfair labor practices under § 8(a)(1), 29 U. S. C. § 158(a)(1). See *NLRB* v. *Laredo Coca Cola Bottling Co.*, 613 F. 2d 1338, 1341 (CA5 1980); *ante*, at 508. *Sears, Roebuck & Co.* v. *Carpenters*, 436 U. S. 180 (1978), suggests, however, that this is not a sufficient ground for pre-emption under the "arguably prohibited" branch of *Garmon*. Unfair labor practice proceedings before the Board based on this arguably prohibited conduct would not be identical to the state-court action involving respondents' misrepresentation claim. See 436 U. S., at 196–197.

Teamsters v. *Morton*, 377 U. S. 252 (1964). During the course of considering a pre-emption question in *Garner*, the Court stated: "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." 346 U. S., at 500. In *Morton*, the Court considered whether a state court should be permitted to award damages under state law for injuries caused by union conduct that was assumed to be neither protected nor prohibited by federal law. 377 U. S., at 258. The Court stated that the answer to this question "ultimately depends upon whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation." *Ibid.* The Court held that it would. *Id.*, at 260. In reaching this conclusion, the Court reasoned that the self-help weapon at issue "formed an integral part of [the union's] effort to achieve its bargaining goals during negotiations with [the employer]." *Id.*, at 259. Permitting the use of this weapon was "part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community." *Ibid.* The Court concluded: "If the [state] law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe . . . , the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." *Id.*, at 259–260.

Machinists relied on *Garner* and *Morton* in expressly articulating a branch of labor law pre-emption analysis distinct from the *Garmon* line of cases. The Court in *Machinists* described this branch as "focusing upon the crucial inquiry whether Congress intended that the conduct involved be unregulated because left 'to be controlled by the free play of economic forces.'" 427 U. S., at 140 (citation omitted). While earlier cases had addressed this question within the context of union and employee activities, see *id.*, at 147, the Court noted that "self-help is . . . also the prerogative of the employer because he, too, may properly employ economic weapons Congress meant to be unregulable." *Ibid.* The Court stated: "Whether self-help economic activities are employed by employer or union, the crucial inquiry regarding pre-emption is the same: whether 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes.'" *Id.*, at 147–148 (citation omitted).[9]

As noted, see *supra*, at 525, employers have the right to hire replacements for striking employees. This is an economic weapon that the employer may use to combat pressure brought to bear by the union. Permitting the use of this weapon is part of the balance struck by the Act between labor and management. There is no doubt that respondents' misrepresentation claim, involving as it does the potential for substantial employer liability, burdens an employer's right to resort to this weapon. This is especially apparent when one considers the fact that the character of a strike is often unclear. A strike that starts as an economic strike, during which an employer is entitled to hire permanent replacements that he need not discharge to make way for returning strikers, may be converted into an unfair labor practice strike, in which case the employer loses his right to hire permanent replacements subsequent to the date of the conversion. See *NLRB* v. *Top Mfg. Co.*, 594 F. 2d 223, 225 (CA9 1979); *NLRB* v. *Johnson Sheet Metal, Inc.*, 442 F. 2d 1056, 1061 (CA10 1971); *Philip Carey Mfg. Co.* v. *NLRB*, 331 F. 2d 720, 728–729 (CA6 1964). See also *ante*, at 507–508; *supra*, at 527.[10] Moreover, in order to preserve his right to retain the replacements and to refuse to reinstate returning strikers, the employer must establish that the replacements have been hired on a permanent basis in order to continue his business operations. See *supra*, at 526–527. Only under these circumstances can the strikers' right to reinstatement be overcome, and the consequent burden on the right to strike be justified.[11]

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[9] See Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1339 (1972) ("[T]he need for preserving the balance of power established by Congress in labor-management relations against disturbance by the application of state laws or decisions making a different accommodation furnishes compelling reason for federal preemption in the areas predominantly involving employee self-organization, collective bargaining, or the use of economic power to secure organizational or bargaining objectives, regardless of whether the alleged misconduct is 'arguably protected or prohibited'").

In order to avoid misrepresentation claims, an employer might decide not to hire replacements on a permanent basis or to hire permanent replacements only in cases in which it is absolutely clear that the strike is an economic one. Either of these developments would mean that employers were being inhibited by state law from making full use of an economic weapon available to them under federal law. Moreover, if an employer decided not to hire replacements on a permanent basis, his ability to hire replacements might be affected adversely. An employer also might decide to disclose to prospective replacements the possibility, even if it is remote, that the strike might be determined to have been an unfair labor practice strike and that he might be ordered to reinstate the strikers and to discharge the replacements. This course of action, however, might limit an employer's ability to hire replacements, and it might have the further effect of rendering the replacements temporary under federal law, in which case the strikers would be entitled to reinstatement regardless of the nature of the strike. See *supra*, at 526–527.

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[10] As noted, *supra*, at 528, the strike in this case arguably was converted into an unfair labor practice strike almost immediately after it started. See *ante*, at 494–495, 507–508.

[11] More than likely, it was the need to carry this burden that caused petitioner to have respondents sign the statements involved in this case. See *ante*, at 494–495.

Based on this analysis, it is clear that permitting respondents to pursue their misrepresentation claim in state court would limit and substantially burden an employer's resort to an economic weapon available to him under federal law. This would have the inevitable effect of distorting the delicate balance struck by the Act between the rights of labor and management in labor disputes. For these reasons, respondents' misrepresentation claim must be pre-empted.[12]

The Court rejects the argument that the prospect of misrepresentation claims being filed in state court will burden an employer's right to hire permanent replacements for employees engaged in an economic strike. The Court suggests that employers may avoid liability for misrepresentation by conditioning their offers of employment to replacements. In the Court's view, a requirement that employers condition their offers of employment will not have an adverse effect on an employer's ability to hire permanent replacements because under a system in which an employer is not liable for misrepresentation or breach of contract his offers are, as a matter of law, conditional. Honest employers would not make promises that they know they are not obligated to keep and, in any event, replacements would know that the offers were, in some respects, nonpermanent. See *ante*, at 502. Putting aside the validity of these observations, the Court's analysis creates another problem: a requirement that employers condition their offers to replacements might render the replacements nonpermanent under federal law and result in employers being required to reinstate returning strikers regardless of the nature of the strike. The Court acknowledges this problem, and in order to resolve it, changes the law of permanency. See *ante,* at 501–504. The Court states:

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[12] It is also true that the prospect of facing misrepresentation claims would make an employer less likely to enter into an agreement settling a strike for the same reasons that were discussed with respect to the breach-of-contract claim. See *supra*, at 528–533. This would also undermine the policies of the Act and affect adversely its administration. See *supra*, at 532–533, and nn. 4, 5, and 6.

> "An employment contract with a replacement promising permanent employment, subject only to settlement with its employees' union and to a Board unfair labor practice order directing reinstatement of strikers, would not in itself render the replacement a temporary employee subject to displacement by a striker over the employer's objection during or at the end of what is proved to be a purely economic strike. The Board suggests that such a conditional offer 'might' render the replacements only temporary hires that the employer would be required to discharge at the conclusion of a purely economic strike. . . . But the permanent-hiring requirement is designed to protect the strikers, who retain their employee status and are entitled to reinstatement unless they have been permanently replaced. . . . [T]he protection is of great moment if the employer is not found guilty of unfair practices, does not settle with the union, or settles without a promise to reinstate. In that eventuality, the employer, although it has prevailed in the strike, may refuse reinstatement only if it has hired replacements on a permanent basis. If it has promised to keep the replacements on in such a situation, discharging them to make way for selected strikers whom it deems more experienced or more efficient would breach its contract with the replacements. Those contracts, it seems to us, create a sufficiently permanent agreement to permit the prevailing employer to abide by its promises." *Ante,* at 503–504 (footnote omitted).

The fact that the Court feels compelled to announce a new standard of "permanency" under federal law highlights the need to pre-empt respondents' misrepresentation claim in this case. The Court is in effect adjusting the balance of power struck by the Act between labor and management. The right to strike is so central to the Act that an employer can refuse to reinstate returning economic strikers only if he can show a legitimate and substantial business justification for the refusal. One such justification is the need to offer permanent employment to replacements in order to continue his business operations. See *Fleetwood Trailer Co.*, 389 U. S., at 378–379; *supra*, at 526. If the employer has not had to offer employment to replacements on a permanent basis then there is no justification for refusing to reinstate the strikers. See *NLRB* v. *Mars Sales & Equipment Co.*, 626 F. 2d, at 572–573; *supra*, at 526–527. The Court's change in the law of permanency weakens the rights of strikers and undermines the protection afforded those rights by the Act.[13]

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[13] The Court suggests that the conditional nature of an offer and promise of permanent employment "does not render the hiring any less permanent if the conditions do not come to pass." *Ante*, at 504, n. 8. The Court goes on to state: "All hirings are to some extent conditional. As the Board recognizes, . . . although respondents were hired on a permanent basis, they were subject to discharge in the event of a business slowdown." *Ibid.* There is a difference, however, between conditions that turn on the performance of the employee, or on the state of the economy, and conditions that depend on the sole discretion of the employer. In the latter case, the condition renders the initial promise of "permanence" wholly illusory.

The Court further suggests:

> "Had [petitioner] not settled and no unfair practices had been filed, surely it would have been free to retain respondents and obligated to do so by the terms of its promises to them. The result should be the same if [petitioner] had promised to retain them if it did not settle with the union and if it were not ordered to reinstate strikers." *Ibid.*

If petitioner had not settled in this case and the strike was later adjudicated to have been an economic one, petitioner might have been free to retain respondents and to refuse to reinstate the strikers. The record suggests that petitioner hired respondents on a permanent basis in order to continue business operations. See *ante*, at 494–495. It is difficult to imagine, however, how a conditional offer like the one described by the Court could be construed as an offer of permanent employment. Under the terms of the Court's conditional offer, the employer is simply saying that he will

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Such adjustments in the balance of power between labor and management are for Congress, not this Court.[14]

The real problem in this case, and another factor that supports pre-emption, is that the words "permanent replace-

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retain the replacements unless he decides, or is ordered, to reinstate the strikers. As the Court notes, *ante*, at 501, the Board requires an employer to "show that the men [and women] who replaced the strikers were regarded by themselves and the [employer] as having received their jobs on a permanent basis." *Georgia Highway Express, Inc.*, 165 N. L. R. B. 514, 516 (1967), aff'd *sub nom. Truck Drivers and Helpers Local No. 728* v. *NLRB*, 131 U. S. App. D. C. 195, 403 F. 2d 921 (1968). See also *Covington Furniture Mfg. Corp.*, 212 N. L. R. B. 214, 220 (1974), enf'd, 514 F. 2d 995 (CA6 1975) ("While an employer may hire permanent replacements during the course of the strike in order to protect and continue his business, and need not discharge those permanent replacements in order to create vacancies for economic (as distinct from unfair labor practice) strikers who wish to return to work, . . . the employer's hiring offer must include a commitment that the replacement position is permanent and not merely a temporary expedient subject to cancellation if the employer so chooses"). It seems clear that the conditional offer endorsed by the Court could not reasonably be construed to give rise to an understanding that the replacements had received their jobs on a permanent basis. This is why the result should *not* be "the same if [petitioner] had promised to retain [respondents] if it did not settle with the union and if it were not ordered to reinstate strikers." *Ante*, at 504, n. 8.

As the Court of Appeals stated in *Laidlaw Corp.* v. *NLRB*, 414 F. 2d 99 (CA7 1969): "The justification for not discharging replacements in order to reinstate strikers, found in *Mackay* and mentioned in *Fleetwood*, is the need of the employer to assure permanent employment to the replacements so that the necessary labor force can be obtained to maintain operations during a strike." *Id.*, at 105. "If an employer hires replacements without a commitment or understanding that the job is permanent and also discharges the strikers, the interest in protecting economic strikers by an entitlement to reinstatement is not overcome by a substantial business justification. The employer has not had to offer the jobs on a permanent basis as an inducement to continuing his operations." *NLRB* v. *Mars Sales & Equipment Co.*, 626 F. 2d 567, 573 (CA7 1980). See also Brief for NLRB as *Amicus Curiae* 17, n. 10. The Court's rule might help to shield employers from misrepresentation or breach-of-contract claims, see *ante*, at 505–506, n. 9, but it will undermine the right to strike.

[14] As additional support for its conclusion, the Court appears to rely on *J. I. Case Co.* v. *NLRB*, 321 U. S. 332 (1944), for the proposition that "in-

ment" have a special meaning within the context of federal labor law. This is not surprising since the words arise in a context that is at the core of federal labor law: the use of economic weapons to achieve legitimate bargaining objectives. Workers hired to replace striking employees on a permanent basis are nonpermanent to the extent that a strike may be determined to have been an unfair labor practice strike and that an employer may be ordered to reinstate strikers. They are also nonpermanent to the extent that a union may "win" a strike and force an employer to agree to a settlement that requires the reinstatement of striking employees. But such workers are "permanent" under other circumstances. There may be situations in which it is reasonably clear that a strike is an economic one and that an employer has a right to hire permanent replacements and to retain them even when the strike has ended. The employer also may be likely to "win" the strike and to find no need to settle with the union. Under these circumstances, a prudent employer still might find it necessary to condition his offers of employment to replacements in order to avoid even a remote possibility that he will be faced with potential liability for misrepresentation.[15]

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dividual contracts of employment must give way to otherwise valid provisions of the collective-bargaining contract, . . . but . . . the Board 'has no power to adjudicate the validity or effect of such contracts except as to their effect on matters within its jurisdiction.'" *Ante*, at 506, quoting 321 U. S., at 340. "[T]he discontinuance of . . . individual contracts [is] 'without prejudice to the assertion of any legal rights the employee may have acquired under such contract *or to any defenses thereto by the employer.*'" *Ante*, at 506, quoting 321 U. S., at 342 (emphasis in original). It is important to note that the individual contracts in *J. I. Case Co.* were not tainted by any unfair labor practice, arguable or otherwise. See *id.*, at 333. In any event, the Court in *J. I. Case Co.* did not consider whether suits based on the individual contracts that might be brought by employees in state court would be pre-empted by federal law. See also n. 3, *supra*.

[15] In its *amicus* brief, the Board suggests that under the broad misrepresentation theory involved in this case, see Brief for NLRB as *Amicus Curiae* 15, n. 7, an employer still might be vulnerable to a fraud suit even if he refuses to enter into a settlement agreement and litigates the character

This would burden his right to hire permanent replacements. Moreover, changing the law of permanency to accommodate this development compromises the rights of strikers, which are a crucial part of the federal scheme.

I share the Court's concern over the plight of workers hired to replace striking employees. Contrary to the Court's suggestion, however, strikes are, to some extent, "war." See *ante*, at 500. As Judge Learned Hand stated more than 40 years ago in a case involving the reinstatement of strikers:

> "It is of course true that the consequences are harsh to those who have taken the strikers' places; strikes are always harsh; it might have been better to forbid them in quarrels over union recognition. But with that we have nothing to do; as between those who have used a lawful weapon and those whose protection will limit its use, the second must yield; and indeed, it is probably true today that most men taking jobs so made vacant, realize from the outset how tenuous is their hold." *NLRB* v. *Remington Rand, Inc.*, 94 F. 2d 862, 871 (CA2 1938).

It might be a better world if strike replacements were afforded greater protection. But if accomplishing this end requires an alteration of the balance of power between labor and management or an erosion of the right to strike, this Court should not pursue it.[16] This Court's notions of what would constitute a more "fair" system are irrelevant to determining whether certain state-law claims must be pre-empted because they interfere with the system of labor-management relations established by Congress.

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of the strike. *Id.*, at 16, n. 9. "If it were ultimately determined that the strike was an unfair labor practice strike and reinstatement of the strikers is required, the replacements could still maintain that the employer fraudulently induced job applicants to accept employment knowing that there was a possibility that reinstatement of the strikers might be ordered." *Ibid.*

[16] The Board suggests that respondents might have an action against the union for breach of its duty of fair representation. *Id.*, at 21, n. 11. There is no need to reach this question in this case.

IV

Permitting respondents to pursue their breach-of-contract and misrepresentation claims in state court will subject employers to potentially conflicting state and federal regulation of their activities; interfere with the orderly administration of the National Labor Relations Act; and alter the balance of power between labor and management struck by Congress. For these reasons, the claims should be pre-empted, and the judgment of the Kentucky Court of Appeals, therefore, should be reversed.

ARIZONA ET AL. v. SAN CARLOS APACHE TRIBE OF ARIZONA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81–2147. Argued March 23, 1983—Decided July 1, 1983*

In *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800, it was held that (1) the McCarran Amendment, which waived the sovereign immunity of the United States as to comprehensive state water rights adjudications, provides state courts with jurisdiction to adjudicate Indian water rights held in trust by the United States, and (2), in light of the federal policies underlying that Amendment, a suit brought by the United States in federal court claiming water rights on behalf of itself and certain Indian Tribes was properly dismissed in favor of concurrent adjudication reaching the same issues in a Colorado state court. The instant cases form a sequel to that decision. In No. 81–2188, the United States and various Indian Tribes brought actions in Federal District Court, seeking an adjudication of rights in certain streams in Montana. Subsequently, the Montana Department of Natural Resources and Conservation filed a petition in state court to adjudicate water rights in the same streams. Still later, the United States brought additional actions in Federal District Court, seeking to adjudicate its rights and the rights of various Indian Tribes in other Montana streams, and these rights also became involved in state proceedings. Motions to dismiss the federal actions were granted, the District Court relying in part on *Colorado River*. On consolidated appeals, the Court of Appeals reversed, holding that Montana might lack jurisdiction to adjudicate claims in state court because the Enabling Act admitting Montana to the Union and the provision of the Montana Constitution promulgated in response to that Act reserved "absolute jurisdiction and control" over Indian lands in Congress; that the State, however, might have acquired such jurisdiction under Pub. L. 280, which allowed a State to acquire certain jurisdiction over Indian affairs and to amend its constitution to remove any impediment to such jurisdiction in a constitutional or statutory declaimer; and that even if it were found that Mon-

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*Together with *Arizona et al.* v. *Navajo Tribe of Indians et al.* (see this Court's Rule 19.4), and No. 81–2188, *Montana et al.* v. *Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation et al.*, also on certiorari to the same court.

tana had validly repealed the disclaimer language in its Constitution, the limited factual circumstances of *Colorado River* prevented its application to the Montana litigation. In No. 81–2147, various water rights claimants in Arizona filed petitions in state court to adjudicate rights in a number of river systems, and the United States was joined in each case both in its independent capacity and as trustee for various Indian Tribes. Thereafter, some of these Indian Tribes filed suits in Federal District Court, seeking, *inter alia*, federal determinations of their water rights. The District Court, relying on *Colorado River*, dismissed most of the actions, while staying one of them pending completion of the state proceedings. The Court of Appeals reversed, holding that the Enabling Act under which Arizona was admitted to statehood and a provision of the Arizona Constitution, both of which were similar to the Montana Enabling Act and Constitution, disabled Arizona from adjudicating Indian water claims.

Held:

1. The federal courts had jurisdiction to hear the suits brought both by the United States and the Indian Tribes, and a dismissal or stay would have been improper if there was no jurisdiction in the concurrent state actions. Public Law 280 would not have authorized the States to assume jurisdiction over adjudication of Indian water rights, since it specifically withheld such jurisdiction. And to the extent that a claimed bar to state jurisdiction is premised on the respective State Constitutions, that is a question of state law over which state courts have binding authority. Pp. 559–561.

2. Whatever limitation the Enabling Acts or federal policy may have originally placed on state-court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment. That Amendment was designed to deal with the general problem arising out of the limitations that federal sovereign immunity placed on the States' ability to adjudicate water rights, and nowhere in the Amendment's text or legislative history is there any indication that Congress intended the efficacy of the remedy to differ from one State to another. To declare now that the holding in *Colorado River* applies only to the immunity of Indian water claims located in States without jurisdictional reservations would constitute a curious and unwarranted retreat from the rationale of *Colorado River* and would work the very mischief that the decision in that case sought to avoid. Pp. 561–565.

3. Where state courts have jurisdiction to adjudicate Indian water rights, concurrent federal suits brought by Indian Tribes, rather than by the United States, and seeking adjudication only of Indian water rights are subject to dismissal under the *Colorado River* doctrine. Pp. 565–570.

(a) If, as appears to be the case here, the state courts have jurisdiction over the Indian water rights at issue, then the concurrent federal proceedings are likely to be duplicative and wasteful. Moreover, since a judgment by either court would ordinarily be res judicata in the other, the existence of the concurrent proceedings creates the potential for spawning an unseemly and destructive race to see which forum can resolve the same issues first—a race contrary to the spirit of the McCarran Amendment and prejudicial to the possibility of reasoned decisionmaking in either forum. Pp. 565–569.

(b) In these cases, assuming that the state adjudications are adequate to quantify the rights at issue in the federal suits, and taking into account the McCarran Amendment policies, the expertise and administrative machinery available to the state courts, the infancy of the federal suits, the general judicial bias against piecemeal litigation, and the convenience to the parties, the District Courts were correct in deferring to the state proceedings. Pp. 569–570.

668 F. 2d 1093, 668 F. 2d 1100, and 668 F. 2d 1080, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, *post*, p. 572. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 572.

Jon L. Kyl argued the cause for petitioners in No. 81–2147. With him on the briefs were *M. Byron Lewis*, *John B. Weldon, Jr.*, *Alvin H. Shrago*, *Robert K. Corbin*, Attorney General of Arizona, *Russell A. Kolsrud*, Assistant Attorney General, and *Bill Stephens*. *Michael T. Greely*, Attorney General of Montana, argued the cause for petitioners in No. 81–2188. With him on the brief were *Helena S. Maclay* and *Deirdre Boggs*, Special Assistant Attorneys General, *Cale Crowley*, *Maurice R. Colberg, Jr.*, *James E. Seykora*, *Bert W. Kronmiller*, and *Douglas Y. Freeman*.

Deputy Solicitor General Claiborne argued the cause for the United States in both cases. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Dinkins*, and *Thomas H. Pacheco*.

Simon H. Rifkind argued the cause for respondents in No. 81–2147. With him on the brief for respondent Navajo

Nation were *Mark H. Alcott, Peter Buscemi, George P. Vlassis*, and *Katherine Ott. Joe P. Sparks, E. Dennis Siler*, and *Kevin T. Tehan* filed a brief for respondents San Carlos Apache Indian Tribe et al. *Philip J. Shea* filed a brief for respondent Salt River Pima-Maricopa Indian Community. *Arlinda Locklear* and *Richard Dauphinais* filed a brief for respondent Ft. McDowell Mohave-Apache Indian Community. *Robert S. Pelcyger* argued the cause for respondents in No. 81–2188 and filed a brief for respondent Crow Tribe of Indians. *Reid Peyton Chambers, Loftus E. Becker, Jr., Jeanne S. Whiteing*, and *Richard Anthony Baenen* filed a brief for respondents Assiniboine and Sioux Tribes et al. *Steven L. Bunch* filed a brief for respondent Bowen.†

JUSTICE BRENNAN delivered the opinion of the Court.

These consolidated cases form a sequel to our decision in *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800 (1976). That case held that (1) the McCarran Amendment, 66 Stat. 560, 43 U. S. C. § 666, which waived the sovereign immunity of the United States as to comprehensive state water rights adjudications,[1] provides state courts with jurisdiction to adjudicate Indian water rights held in trust by the United States, and (2), in light of the clear federal policies underlying the McCarran Amendment, a water rights suit brought by the United States in federal court was properly dismissed in favor of a concurrent comprehensive adjudication reaching the same issues in Colorado state court. The questions in these cases are parallel: (1) What is the effect of the McCarran Amendment in those States which, unlike Colorado, were admitted to the Union subject to federal legislation that reserved "absolute jurisdiction and control" over Indian lands in the Congress of the United States? (2) If the courts of such States do have jurisdiction to adjudicate Indian water rights, should concurrent federal suits brought by Indian tribes, rather than by the United States, and raising only Indian claims, also be subject to dismissal under the doctrine of *Colorado River?*

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†Briefs of *amici curiae* urging reversal in both cases were filed by *J. D. MacFarlane*, Attorney General, *Charles G. Howe*, Deputy Attorney General, *Joel W. Cantrick*, Solicitor General, and *David Ladd* and *William A. Paddock*, Assistant Attorneys General, for the State of Colorado; by *Jeff Bingaman*, Attorney General, and *Peter Thomas White*, Special Assistant Attorney General, for the State of New Mexico; by *Mark V. Meierhenry*, Attorney General, and *Harold H. Deering* and *John P. Guhin*, Assistant Attorneys General, for the State of South Dakota; by *Kenneth O. Eikenberry*, Attorney General of Washington, *Charles B. Roe, Jr.*, Senior Assistant Attorney General, *David H. Leroy*, Attorney General of Idaho, and *David L. Wilkinson*, Attorney General of Utah, for the State of Washington et al.; by *Steven F. Freudenthal*, Attorney General, *Lawrence J. Wolfe*, Assistant Attorney General, *Michael D. White*, and *James L. Merrill* for the State of Wyoming; and by *Kenneth Balcomb, Robert L. McCarty*, and *Donald H. Hamburg* for the Colorado River Water Conservation District et al.

Lester K. Taylor filed a brief for the Jicarilla Apache Tribe as *amicus curiae* urging affirmance in both cases. *Richard W. Hughes* filed a brief for the Chippewa-Cree Tribes of the Rocky Boys Reservation, Montana, as *amicus curiae* urging affirmance in No. 81–2188.

I

Colorado River arose out of a suit brought by the Federal Government in the United States District Court for the District of Colorado seeking a declaration of its rights, and the rights of a number of Indian Tribes, to waters in certain rivers and their tributaries located in one of the drainage basins of the State of Colorado. In the suit, the Government asserted reserved rights, governed by federal law,[2] as well as rights based on state law. Shortly after the federal suit was commenced, the United States was joined, pursuant to the McCarran Amendment, as a party in the ongoing state-court comprehensive water adjudication being conducted for the same drainage basin. The Federal District Court, on motion of certain of the defendants and intervenors, dismissed the federal suit, stating that the doctrine of abstention required deference to the state proceedings. The Court of Appeals reversed the District Court, and we in turn reversed the Court of Appeals.

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[1] The McCarran Amendment provides in relevant part:

"(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances . . . ."

We began our analysis in *Colorado River* by conceding that the District Court had jurisdiction over the federal suit under 28 U. S. C. § 1345, the general provision conferring district court jurisdiction over most civil actions brought by the Federal Government. We then examined whether the federal suit was nevertheless properly dismissed in view of the concurrent state-court proceedings. This part of the analysis began by considering "whether the McCarran Amendment provided consent to determine federal reserved rights held on behalf of Indians in state court," 424 U. S., at 809, since "given the claims for Indian water rights in [the federal suit], dismissal clearly would have been inappropriate if the state court had no jurisdiction to decide those claims." *Ibid.* We concluded:

> "Not only the Amendment's language, but also its underlying policy, dictates a construction including Indian rights in its provisions. [*United States* v. *District Court for Eagle County*, 401 U. S. 520 (1971),] rejected the conclusion that federal reserved rights in general were not reached by the Amendment for the reason that the

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[2] See generally *Arizona* v. *California*, 373 U. S. 546 (1963); *Winters* v. *United States*, 207 U. S. 564 (1908).

> Amendment '[deals] with an all-inclusive statute concerning "the adjudication of rights to the use of water of a river system."' *Id.*, at 524. This consideration applies as well to federal water rights reserved for Indian reservations." *Id.*, at 810.

In sum, considering the important federal interest in allowing all water rights on a river system to be adjudicated in a single comprehensive state proceeding, and "bearing in mind the ubiquitous nature of Indian water rights in the Southwest," it was clear to us "that a construction of the Amendment excluding those rights from its coverage would enervate the Amendment's objective." *Id.*, at 811.

We buttressed this conclusion with an examination of the legislative history of the McCarran Amendment. We also noted:

> "Mere subjection of Indian rights to legal challenge in state court . . . would no more imperil those rights than would a suit brought by the Government in district court for their declaration . . . . The Government has not abdicated any responsibility fully to defend Indian rights in state court, and Indian interests may be satisfactorily protected under regimes of state law. The Amendment in no way abridges any substantive claim on behalf of Indians under the doctrine of reserved rights. Moreover, as *Eagle County* said, 'questions [arising from the collision of private rights and reserved rights of the United States], including the volume and scope of particular reserved rights, are federal questions which, if preserved, can be reviewed [by the Supreme Court] after final judgment by the Colorado court.' 401 U. S., at 526." *Id.*, at 812–813 (citations omitted).

We then considered the dismissal itself. We found that the dismissal could not be supported under the doctrine of abstention in any of its forms, but that it was justified as an application of traditional principles of "'[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" *Id.*, at 817, quoting *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U. S. 180, 183 (1952). We stated that, although the federal courts had a "virtually unflagging obligation . . . to exercise the jurisdiction given them," 424 U. S., at 817, there were certain very limited circumstances outside the abstention context in which dismissal was warranted in deference to a concurrent state-court suit. See generally *id.*, at 817–819; *Moses H. Cone Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 13–19 (1983). In the case at hand, we noted the comprehensive nature of the state proceedings and the considerable expertise and technical resources available in those proceedings, 424 U. S., at 819–820. We concluded:

> "[A] number of factors clearly counsel against concurrent federal proceedings. The most important of these is the McCarran Amendment itself. The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent. Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals." *Id.*, at 819 (citations omitted).

For these reasons, and others,[3] we affirmed the judgment of the District Court dismissing the federal complaint.

II

The two petitions considered here arise out of three separate consolidated appeals that were decided within three days of each other by the same panel of the Court of Appeals for the Ninth Circuit. In each of the underlying cases, either the United States as trustee or certain Indian Tribes on their own behalf, or both, asserted the right to have certain Indian water rights in Arizona or Montana adjudicated in federal court.

The Montana Cases (No. 81–2188)

In January 1975, the Northern Cheyenne Tribe brought an action in the United States District Court for the District of Montana seeking an adjudication of its rights in certain streams in that State. Shortly thereafter, the United States brought two suits in the same court, seeking a determination of water rights both on its own behalf and on behalf of a number of Indian Tribes, including the Northern Cheyenne, in the same streams. Each of the federal actions was a general adjudication which sought to determine the rights *inter sese* of *all* users of the stream, and not merely the rights of the plaintiffs. On motion of the Northern Cheyenne, its action was consolidated with one of the Government actions. The other concerned Tribes intervened as appropriate.

At about the time that all this activity was taking place in federal court, the State of Montana was preparing to begin a process of comprehensive water adjudication under a recently passed state statute. In July 1975, the Montana Department of Natural Resources and Conservation filed petitions in state court commencing comprehensive proceedings to adjudicate water rights in the same streams at issue in the federal cases.

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[3] The other factors were the apparent absence at the time of dismissal of any proceedings in the District Court other than the filing of the complaint, the extensive involvement of state water rights in the suit, the 300-mile distance between the Federal District Court in Denver and the state tribunal, and the Government's apparent willingness to participate in other comprehensive water proceedings in the state courts.

Both sets of contestants having positioned themselves, nothing much happened for a number of years. The federal proceedings were stayed for a time pending our decision in *Colorado River*. When that decision came down, the State of Montana, one of the defendants in the federal suits, brought a motion to dismiss, which was argued in 1976, but not decided until 1979. Meanwhile, process was completed in the various suits, answers were submitted, and discovery commenced. Over in the state courts, events moved even more slowly, and no appreciable progress seems to have been made by 1979.

In April 1979, the United States brought four more suits in federal court, seeking to adjudicate its rights and the rights of various Indian Tribes in other Montana streams. One month later, the Montana Legislature amended its water adjudication procedures "to expedite and facilitate the adjudication of existing water rights." Act to Adjudicate Claims of Existing Water Rights in Montana, Ch. 697, § 1(1), 1979 Mont. Laws 1901. The legislation provided for the initiation of comprehensive proceedings by order of the Montana Supreme Court, the appointment of water judges throughout the State, and the consolidation of all existing actions within each water division. It also provided, among other things, that the Montana Supreme Court should issue an order requiring all claimants not already involved in the state proceedings, including the United States on its own behalf or as trustee for the Indians, to file a statement of claim with the Department of Natural Resources and Conservation by a date set by the court or be deemed to have abandoned any water rights claim. § 16, 1979 Mont. Laws 1906–1907, codified at Mont. Code Ann. § 85–2–212 (1981).[4] The Montana court issued the required order, and the United States was served with formal notice thereof.[5]

In November 1979, the two judges for the District of Montana jointly considered the motions to dismiss in each of the federal actions,[6] and granted each of them. *Northern Cheyenne Tribe of Northern Cheyenne Indian Reservation* v. *Tongue River Water Users Assn.*, 484 F. Supp. 31. The court relied strongly on the new Montana legislation, stating:

> "The above-cited sections reflect both the policy and the essential mechanism for adjudication of state water rights. Adjudication by adversary proceeding initiated by one claimant against all others in his drainage has been forsaken in favor of blanket adjudication of *all* claims, including federal and federal trust claims . . . . It is clear that the adjudication contemplated by the [1979 legislation] is both comprehensive and efficient. As the general adjudication has been initiated by recent order of the Montana Supreme Court, it would seem that the greater wisdom lies in following *Colorado River*, and, on the basis of wise judicial administration, deferring to the comprehensive state proceedings." *Id.*, at 35–36.

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[4] The statute required that the filing period established by the Montana Supreme Court be no less than one year, and that it be subject to extension, but not beyond June 30, 1983. Mont. Code Ann. § 85–2–212(2) (1981). In 1981, the statute was amended to exempt from the filing deadline Indian claims being negotiated with the Montana Reserved Water Rights Compact Commission. Ch. 268, § 4, 1981 Mont. Laws 393, codified at Mont. Code Ann. § 85–2–217 (1981).

[5] The Montana Supreme Court set an original filing deadline of January 1, 1982, App. to Pet. for Cert. in No. 81–2188, pp. 138–139, and then extended the deadline to April 30, 1982, *id.*, at 140–141. The United States apparently made protective filings by the deadline on behalf of all the Montana Tribes. Brief for Petitioners in No. 81–2188, p. 32. Two of the Indian Tribes apparently filed statements of claim of their own, and five apparently are negotiating with the Montana Reserved Water Rights Compact Commission, see n. 4, *supra*.

[6] See generally C. Wright, Law of Federal Courts 9 (4th ed. 1983).

The District Court also noted, among other things, that the federal proceedings "are all in their infancy; service of process has been but recently completed," *id.*, at 36, that the state forums were geographically more convenient to the parties, that "[t]he amount of time contemplated for completion of the state adjudication is significantly less than would be necessary for federal adjudication, insofar as the state has provided a special court system solely devoted to water rights adjudication," *ibid.*, and that "[t]he possibility of conflicting adjudications by the concurrent forums . . . looms large and could be partially avoided only by staying the pending state adjudication, an action *Colorado River* has intimated is distinctly repugnant to a clear state policy and purpose." *Ibid.*

On appeal, a divided Court of Appeals reversed. *Northern Cheyenne Tribe of Northern Cheyenne Indian Reservation* v. *Adsit*, 668 F. 2d 1080 (CA9 1982). First, it held that Montana, unlike Colorado, might well lack jurisdiction to adjudicate Indian claims in state court. The court reached this conclusion on the basis of two closely linked documents: the Enabling Act under which Montana was admitted to statehood, and the Montana Constitution promulgated in response to that Enabling Act, both of which provide, in identical terms, that the people inhabiting Montana

> "agree and declare that they forever disclaim all right and title to . . . all lands . . . owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . ." Enabling Act of Feb. 22, 1889, § 4, 25 Stat. 677 (North Dakota, South Dakota, Montana, and Washington); Mont. Const., Ordinance No. I (1895).

The Court of Appeals concluded that, by their terms, the Enabling Act and constitutional disclaimer prohibit Montana from exercising even adjudicatory jurisdiction over Indian water rights, and that the McCarran Amendment effected no change in that disability. It also held, however, that the State might have acquired such jurisdiction under Pub. L. 280, 67 Stat. 588, which, from 1953 until its amendment in 1968, allowed any State that wished to do so to acquire certain aspects of civil and criminal jurisdiction over Indian affairs, and authorized States with constitutional or statutory disclaimers to "amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment" to the assumption of such jurisdiction. § 6, 67 Stat. 590. See generally *Washington* v. *Yakima Indian Nation*, 439 U. S. 463 (1979). The court did not decide whether Montana had amended its Constitution in accordance with the requirements of Pub. L. 280, cf. *Yakima Indian Nation, supra*, at 478–493, but it criticized the District Court for not undertaking such an analysis.

The second, and dispositive, ground of decision in the Court of Appeals, however, was its conclusion that "[e]ven if we were to find that Montana had validly repealed the disclaimer language in its constitution, . . . [t]he limited factual circumstances of *[Colorado River]* prevent its application to the Montana litigation." 668 F. 2d, at 1087. In reaching this conclusion, the court relied in part on the infancy of both the federal and state proceedings in the Montana litigation, the possible inadequacy of the state proceedings (which it did not discuss in great detail), and the fact that the Indians (who could not be joined involuntarily in the state proceedings) might not be adequately represented by the United States in state court in light of conflicts of interest between the Federal Government's responsibilities as trustee and its own claims to water.

The Arizona Cases (No. 81–2147)

In the mid-1970's, various water rights claimants in Arizona filed petitions in state court to initiate general adjudications to determine conflicting rights in a number of river systems. In early 1979, process was served in one of the proceedings on approximately 12,000 known potential water claimants, including the United States. In July 1981, process was served in another proceeding on approximately 58,000 known water claimants, again including the United States. In each case, the United States was joined both in its independent capacity and as trustee for various Indian Tribes.

In March and April 1979, a number of Indian Tribes whose rights were implicated by the state water proceedings filed a series of suits in the United States District Court for the District of Arizona, asking variously for removal of the state adjudications to federal court, declaratory and injunctive relief preventing any further adjudication of their rights in state court, and independent federal determinations of their water rights. A number of defendants in the federal proceedings filed motions seeking remand or dismissal. The District Court, relying on *Colorado River*, remanded the removed actions, and dismissed most of the independent federal actions without prejudice. *In re Determination of Conflicting Rights to Use of Water from Salt River Above Granite Reef Dam*, 484 F. Supp. 778 (1980).[7] It stayed one of the remaining actions pending the completion of state proceedings. App. to Pet. for Cert. in No. 81–2147, p. D–1.

The Tribes appealed from these decisions, with the exception of the remand orders.[8] The Court of Appeals reversed, holding that the Enabling Act under which Arizona was admitted to statehood, 36 Stat. 557, and the Arizona Constitution, Art. 20, ¶4, both of which contain wording substantially identical to the Montana Enabling Act and Constitution, disabled Arizona from adjudicating Indian water claims. *San Carlos Apache Tribe* v. *Arizona*, 668 F. 2d 1093 (CA9 1982); *Navajo Nation* v. *United States*, 668 F. 2d 1100 (CA9 1982). The court remanded to the District Court to determine whether Arizona nevertheless "properly asserted jurisdiction pursuant to Public Law 280." 668 F. 2d, at 1098; see 668 F. 2d, at 1102. The court did not decide whether, if the State had properly asserted jurisdiction, dismissal would have been proper under *Colorado River*, except to note that "the district judge did not make findings on this issue and the record indicates significant differences between these cases and *[Colorado River]*." 668 F. 2d, at 1098; see 668 F. 2d, at 1102.

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[7] Two of the actions are in abeyance, apparently pending completion of service of process.

[8] The stay order was certified for interlocutory appeal under 28 U. S. C. § 1292(b). See also *Moses H. Cone Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 8–13 (1983) (upholding appealability of similar stay order under 28 U. S. C. § 1291).

We granted certiorari, 459 U. S. 821 (1982), in order to resolve a conflict among the Circuits regarding the role of federal and state courts in adjudicating Indian water rights.[9] We now reverse.

III

A

At the outset of our analysis, a number of propositions are clear. First, the federal courts had jurisdiction here to hear the suits brought both by the United States and the Indian Tribes.[10] Second, it is also clear in these cases, as it was in

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[9] In *Jicarilla Apache Tribe* v. *United States*, 601 F. 2d 1116 (1979), the Court of Appeals for the Tenth Circuit held that the Enabling Act under which New Mexico was admitted to the Union (whose language is essentially the same as the Enabling Acts at issue in these cases) did not bar state jurisdiction over Indian water rights, and upheld the District Court's dismissal of a general water adjudication suit brought in federal court by the Jicarilla Apache Tribe.

[10] The primary ground of jurisdiction for the suits brought by the United States is 28 U. S. C. § 1345. The primary ground of jurisdiction for the suits brought by the Indians is 28 U. S. C. § 1362, which provides in rele-

Colorado River, that a dismissal or stay of the federal suits would have been improper if there was no jurisdiction in the concurrent state actions to adjudicate the claims at issue in the federal suits. 424 U. S., at 800. Third, the parties here agree that the Court of Appeals erred in believing that, in the absence of state jurisdiction otherwise, Pub. L. 280 would have authorized the States to assume jurisdiction over the adjudication of Indian water rights. To the contrary, Pub. L. 280 specifically withheld from state courts jurisdiction to adjudicate ownership or right to possession "of any real or personal property, *including water rights*, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States." 28 U. S. C. § 1360(b) (emphasis added).[11] Thus, the presence or

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vant part: "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." Section 1362 was passed in 1966 in order to give Indian tribes access to federal court on federal issues without regard to the $10,000 amount-in-controversy requirement then included in 28 U. S. C. § 1331, the general federal-question jurisdictional statute. Congress contemplated that § 1362 would be used particularly in situations in which the United States suffered from a conflict of interest or was otherwise unable or unwilling to bring suit as trustee for the Indians, and its passage reflected a congressional policy against relegating Indians to state court when an identical suit brought on their behalf by the United States could have been heard in federal court. See S. Rep. No. 1507, 89th Cong., 2d Sess., 2–3 (1966); H. R. Rep. No. 2040, 89th Cong., 2d Sess., 2, 4 (1966). Just as the McCarran Amendment did not do away with federal jurisdiction over water rights claims brought under § 1345, *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800, 806–809 (1976), there is no reason to think that it limits the jurisdictional reach of § 1362.

[11] As we explained in *Colorado River*, however, these provisions "only qualif[y] the import of the general consent to state jurisdiction given by [Pub. L. 280, and] . . . [do] not purport to limit the special consent to jurisdiction given by the McCarran Amendment." 424 U. S., at 812–813, n. 20.

absence of jurisdiction must rise or fall without reference to whether the States have assumed jurisdiction under Pub. L. 280.

Finally, it should be obvious that, to the extent that a claimed bar to state jurisdiction in these cases is premised on the respective State Constitutions, that is a question of state law over which the state courts have binding authority. Because, in each of these cases, the state courts have taken jurisdiction over the Indian water rights at issue here, we must assume, until informed otherwise, that—at least insofar as state law is concerned—such jurisdiction exists. We must therefore look, for our purposes, to the federal Enabling Acts and other federal legislation, in order to determine whether there is a federal bar to the assertion of state jurisdiction in these cases.

B

That we were not required in *Colorado River* to interpret the McCarran Amendment in light of any statehood Enabling Act was largely a matter of fortuity, for Colorado is one of the few Western States that were not admitted to the Union pursuant to an Enabling Act containing substantially the same language as is found in the Arizona and Montana Enabling Acts.[12] Indeed, a substantial majority of Indian land—including most of the largest Indian reservations—lies in States subject to such Enabling Acts.[13] Moreover, the reason that Colorado was not subject to such an Enabling

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[12] See Enabling Act of Feb. 22, 1889, § 4, 25 Stat. 676–677 (North Dakota, South Dakota, Montana, and Washington); Enabling Act of July 16, 1894, § 3, 28 Stat. 108 (Utah); Enabling Act of June 16, 1906, § 3, 34 Stat. 270 (Oklahoma); Enabling Act of June 20, 1910, §§ 2, 20, 36 Stat. 558–559, 569 (New Mexico and Arizona); Enabling Act of July 7, 1958, § 4, 72 Stat. 339, as amended by Pub. L. 86–70, § 2(a), 73 Stat. 141 (Alaska). Idaho and Wyoming, which were both admitted to statehood in 1890 without prior Enabling Acts, nevertheless inserted disclaimers in their State Constitutions. See Idaho Const., Art. 21, § 19; Wyo. Const., Art. 21, § 26.

[13] See Brief for United States 12, and sources cited.

Act, and Arizona and Montana were, has more to do with historical timing than with deliberate congressional selection. Colorado was admitted to the Union in 1876. In 1882, this Court held in *United States* v. *McBratney*, 104 U. S. 621, that the federal courts in Colorado had no criminal jurisdiction in a murder committed by one non-Indian against another on an Indian reservation, pointing out that the case did not concern "the punishment of crimes committed by or against Indians, the protection of the Indians in their improvements, or the regulation by Congress of the alienation and descent of property and the government and internal police of the Indians." *Id.*, at 624. We also suggested, however, that the result might have been different if Congress had expressly reserved all criminal jurisdiction on Indian reservations when Colorado was admitted to the Union, pointing to a similar disclaimer contained in the legislation by which Kansas was admitted to statehood in 1861. *Id.*, at 623–624; see *The Kansas Indians*, 5 Wall. 737 (1867). Probably in response to the *McBratney* decision, Congress resumed the practice of including reservations in Enabling Acts, and did so in the case of virtually every State admitted after 1882. See n. 12, *supra.*

Despite *McBratney* and *The Kansas Indians*, the presence or absence of specific jurisdictional disclaimers has rarely been dispositive in our consideration of state jurisdiction over Indian affairs or activities on Indian lands. In *Draper* v. *United States*, 164 U. S. 240 (1896), for example, this Court held that, despite the jurisdictional reservation in the Montana Enabling Act, a federal court still did not have jurisdiction over a crime committed on an Indian reservation by one non-Indian against another. We stated:

> "As equality of statehood is the rule, the words relied on here to create an exception cannot be construed as doing so, if, by any reasonable meaning, they can be otherwise treated. The mere reservation of jurisdiction and control by the United States of 'Indian lands' does not of

> necessity signify a retention of jurisdiction in the United States to punish all offences committed on such lands by others than Indians or against Indians." *Id.*, at 244–245.

Similarly, in *Organized Village of Kake* v. *Egan*, 369 U. S. 60 (1962), we held that a reservation in the Alaska Enabling Act did not deprive the State of the right to regulate Indian fishing licensed by the Department of the Interior, finding that the state regulation neither interfered with Indian self-government nor impaired any right granted or reserved by federal law. Conversely, *Worcester* v. *Georgia*, 6 Pet. 515 (1832), perhaps the most expansive declaration of Indian independence from state regulation ever uttered by this Court, pertained to one of the original 13 States, unbound by any Enabling Act whatsoever. See also, *e. g.*, *The New York Indians*, 5 Wall. 761, 769–770 (1867) (reaching same conclusion as *The Kansas Indians*, *supra*, but without benefit of disclaimer). And our many recent decisions recognizing crucial limits on the power of the States to regulate Indian affairs have rarely either invoked reservations of jurisdiction contained in statehood Enabling Acts by anything more than a passing mention or distinguished between disclaimer States and nondisclaimer States. See, *e. g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324 (1983); *Ramah Navajo School Board* v. *Bureau of Revenue*, 458 U. S. 832 (1982); *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136 (1980); *Bryan* v. *Itasca County*, 426 U. S. 373 (1976); *Williams* v. *Lee*, 358 U. S. 217 (1959).

In light of this history, the parties in these cases have engaged in a vigorous debate as to the exact meaning and significance of the Arizona and Montana Enabling Acts.[14] We need not resolve that debate, however, nor need we resort to the more general doctrines that have developed to chart the limits of state authority over Indians, because we are convinced that, whatever limitation the Enabling Acts or federal policy may have originally placed on state-court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment.[15] Cf. *Washington* v. *Yakima Indian Nation,* 439 U. S., at 484–493. Congress clearly would have had the right to distinguish between disclaimer and nondisclaimer States in passing the McCarran Amendment. But the Amendment was designed to deal with a general problem arising out of the limitations that federal sovereign immunity placed on the ability of the States to adjudicate water rights, and nowhere in its text or legislative history do we find any indication that Congress intended the efficacy of the remedy to differ from one State to another. Moreover, we stated in *Colorado River* that "bearing in mind the ubiquitous nature of Indian water rights in the Southwest, it is clear that a construction of the Amendment excluding those rights from its coverage would enervate the Amendment's objective." 424 U. S., at 811. The "ubiquitous nature of Indian water rights" is most apparent in the very States to which Congress attached jurisdictional reservations. See *supra,* at 561. To declare now that our holding in *Colorado River* applies only to that minority of Indian water claims located in States without jurisdictional reservations would constitute a curious and unwarranted retreat from the rationale behind our previous holding, and would work the very mischief that our decision in *Colorado River* sought to avoid. We need not rely on the possibly overbroad statement in

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[14] The United States, alone among the respondents, agrees that, in light of the McCarran Amendment, the Enabling Acts at issue here do not pose an obstacle to state jurisdiction to adjudicate Indian water rights. Brief for United States 11–15.

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[15] Because we do not construe the original meaning of the Enabling Acts, we also have no occasion to decide (assuming the relevance of the Acts in the first place) whether the McCarran Amendment's grant of permission to the States to adjudicate Indian water rights was effected by a partial repeal of the Enabling Acts, or by an exercise of the very power reserved to Congress under those Acts.

Draper v. *United States* that "equality of statehood is the rule," 164 U. S., at 244, in order to conclude that, in this context at least, "equality of statehood" is sensible, necessary, and, most important, consistent with the will of Congress.

IV

The second crucial issue in these cases is whether our analysis in *Colorado River* applies with full force to federal suits brought by Indian tribes, rather than by the United States, and seeking adjudication only of Indian water rights.[16] This question is not directly answered by *Colorado River*, because we specifically reserved in that case "[w]hether similar considerations would permit dismissal of a water suit brought by a private party in federal district court." 424 U. S., at 820,

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[16] As is apparent from our discussion of the facts, *supra*, at 553–558, some of the cases now before us are suits brought by the United States. In light of our express holding in *Colorado River*, what we say here with regard to the suits brought by the Indians must apply *a fortiori* to the suits brought by the United States. In addition, some of the cases before us sought adjudication of *all* the rights to a particular water system, rather than merely Indian or other federal water rights, and it is argued that these suits avoid the "piecemeal adjudication of water rights" which we found in *Colorado River* to be inconsistent with federal policy. 424 U. S., at 819. See, *e. g.*, Brief for Respondents Assiniboine and Sioux Tribes et al. 25–29. Given, however, that one of the best arguments in favor of retaining federal jurisdiction in Indian water cases is that Indian water rights can be adjudicated separately and then incorporated into the results of the comprehensive state proceedings, see *infra*, at 567, the proper analysis of the more ambitious federal suits at issue here must also follow *a fortiori* from our discussion in text. A comprehensive federal adjudication going on at the same time as a comprehensive state adjudication might not literally be "piecemeal." It is, however, duplicative, wasteful, inconsistent with the McCarran Amendment's policy of "recogniz[ing] the availability of comprehensive state systems for adjudication of water rights as the means for [conducting unified water rights proceedings]," 424 U. S., at 819, likely to "generat[e] . . . additional litigation" as a result of "inconsistent dispositions of property," *ibid.*, and permeated with state-law issues entirely tangential to any conceivable federal interest, see *id.*, at 820; cf. *Moses H. Cone Hospital*, 460 U. S., at 19–26.

n. 26. On reflection, however, we must agree with JUSTICE STEVENS, who, in dissenting from our decision, wrote: "[T]he Federal Government surely has no lesser right of access to the federal forum than does a private [party], such as an Indian asserting his own claim. If this be so, today's holding will necessarily restrict the access to federal court of private plaintiffs asserting water rights claims in Colorado." *Id.*, at 827.

The United States and the various Indian respondents raise a series of arguments why dismissal or stay of the federal suit is not appropriate when it is brought by an Indian tribe and only seeks to adjudicate Indian rights. (1) Indian rights have traditionally been left free of interference from the States. (2) State courts may be inhospitable to Indian rights. (3) The McCarran Amendment, although it waived United States sovereign immunity in state comprehensive water adjudications, did not waive *Indian* sovereign immunity. It is therefore unfair to force Indian claimants to choose between waiving their sovereign immunity by intervening in the state proceedings and relying on the United States to represent their interests in state court, particularly in light of the frequent conflict of interest between Indian claims and other federal interests and the right of the Indians under 28 U. S. C. § 1362 to bring suit on their own behalf in federal court.[17] (4) Indian water rights claims are generally based on federal rather than state law. (5) Because Indian water claims are based on the doctrine of "reserved rights," and take priority over most water rights created by state law, they need not as a practical matter be adjudicated *inter sese* with other water rights, and could simply be incorporated into the comprehensive state decree at the conclusion of the state proceedings.

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[17] This argument, of course, suffers from the flaw that, although the McCarran Amendment did not waive the sovereign immunity of Indians as *parties* to state comprehensive water adjudications, it did (as we made quite clear in *Colorado River*) waive sovereign immunity with regard to the Indian *rights* at issue in those proceedings. Moreover, contrary to the submissions by certain of the parties, any judgment against the United States, as trustee for the Indians, would ordinarily be binding on the Indians. In addition, there is no indication in these cases that the state courts would deny the Indian parties leave to intervene to protect their interests. Thus, although the Indians have the right to refuse to intervene even if they believe that the United States is not adequately representing their interests, the practical value of that right in this context is dubious at best.

Each of these arguments has a good deal of force. We note, though, that very similar arguments were raised and rejected in *United States* v. *District Court for Eagle County*, 401 U. S. 520 (1971), and *Colorado River*.[18] More important, all of these arguments founder on one crucial fact: If the state proceedings have jurisdiction over the Indian water rights at issue here, as appears to be the case,[19] then concurrent federal proceedings are likely to be duplicative and wasteful, generating "additional litigation through permitting inconsistent dispositions of property." *Colorado River*, 424 U. S., at 819. Moreover, since a judgment by either court would ordinarily be res judicata in the other, the existence of such concurrent proceedings creates the serious potential for spawning an unseemly and destructive race to see which forum can resolve the same issues first—a race contrary to the entire spirit of the McCarran Amendment and prejudicial, to say the least, to the possibility of reasoned decisionmaking by either forum. The United States and many of the Indian Tribes recognize these concerns, but in responding to them they cast aside the sort of sound argument generally apparent in the rest of their submissions and rely instead on vague statements of faith and hope. The United States, for example, states that adjudicating Indian water rights in federal court, despite the existence of a comprehensive state proceeding, would not

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[18] See, *e. g.*, Brief for United States in *United States* v. *District Court for Eagle County*, O. T. 1970, No. 87, p. 19 ("excluding reserved water rights of the United States from State adjudication proceedings would not produce the 'undesirable, impractical and chaotic situation' that the Colorado Supreme Court envisioned); Brief for United States in *Colorado River Conservation District* v. *United States*, O. T. 1975, No. 74–940, p. 33 (federal suit brought by United States involves only questions of federal law); pp. 35–36 (federal forum necessary to avoid "local prejudice"); pp. 43–44 (federal adjudication of Indian water rights can be incorporated into comprehensive state proceedings); p. 50 (separate proceedings practical, as long as all determinations are ultimately integrated); pp. 53–54 (construing McCarran Amendment to grant States jurisdiction to adjudicate Indian water rights would ignore "unique legal status of Indian property").

[19] But cf. n. 20, *infra*.

> "entail any duplication or potential for inconsistent judgments. The federal court will quantify the Indian rights only if it is asked to do so before the State court has embarked on the task. And, of course, once the United States district court has indicated its determination to perform that limited role, *we assume* the State tribunal will turn its attention to the typically more complex business of adjudicating all other claims on the stream. *In the usual case*, the federal court will have completed its function earlier and its quantification of Indian water rights will simply be incorporated in the comprehensive State court decree." Brief for United States 30 (emphasis added).

Similarly, the Navajo Nation states:

> "There is no reasonably foreseeable danger that [the] federal action [brought by the Navajo] will duplicate or delay state proceedings or waste judicial resources. While the Navajo claim proceeds in federal court, the state court *can* move forward to assess, quantify, and rank the 58,000 state claims. The Navajo federal action will be concluded long before the state court has finished its task." Brief for Respondent Navajo Nation in No. 81–2147, p. 22 (emphasis added; footnote omitted).

The problem with these scenarios, however, is that they assume a cooperative attitude on the part of state courts, state legislatures, and state parties which is neither legally required nor realistically always to be expected. The state courts need not "turn their attention" to other matters if they are prompted by state parties to adjudicate the Indian claims first. Moreover, considering the specialized resources and experience of the state courts, it is not at all obvious that the federal actions "will be concluded long before" the state courts have issued at least preliminary judgments on the question of Indian water rights. Cf. 484 F. Supp., at 36.

The McCarran Amendment, as interpreted in *Colorado River*, allows and encourages state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudications. Although adjudication of those rights in federal court instead might in the abstract be practical, and even wise, it will be neither practical nor wise as long as it creates the possibility of duplicative litigation, tension and controversy between the federal and state forums, hurried and pressured decisionmaking, and confusion over the disposition of property rights.

Colorado River, of course, does not require that a federal water suit must always be dismissed or stayed in deference to a concurrent and adequate comprehensive state adjudication. Certainly, the federal courts need not defer to the state proceedings if the state courts expressly agree to stay their own consideration of the issues raised in the federal action pending disposition of that action. Moreover, it may be in a particular case that, at the time a motion to dismiss is filed, the federal suit at issue is well enough along that its dismissal would itself constitute a waste of judicial resources and an invitation to duplicative effort. See *Colorado River*, *supra*, at 820; *Moses H. Cone Hospital*, 460 U. S., at 21–22. Finally, we do not deny that, in a case in which the arguments for and against deference to the state adjudication were otherwise closely matched, the fact that a federal suit was brought by Indians on their own behalf and sought only to adjudicate Indian rights should be figured into the balance. But the most important consideration in *Colorado River*, and the most important consideration in any federal water suit concurrent to a comprehensive state proceeding, must be the "policy underlying the McCarran Amendment," 424 U. S., at 820; see *Moses H. Cone Hospital*, *supra*, at 16, and, despite the strong arguments raised by the respondents, we cannot conclude that water rights suits brought by Indians and seeking adjudication only of Indian rights should be excepted from the application of that policy or from the general principles set out in *Colorado River*. In the cases before us, assuming that the state adjudications are adequate to quantify the rights at issue in the federal suits,[20] and taking into account the McCarran Amendment policies we have just discussed, the expertise and administrative machinery available to the state courts, the infancy of the federal suits, the general judicial bias against piecemeal litigation, and the convenience to the parties, we must conclude that the District Courts were correct in deferring to the state proceedings.[21]

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Nothing we say today should be understood to represent even the slightest retreat from the general proposition we expressed so recently in *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S., at 332: "Because of their sovereign status,

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[20] In a number of these cases, respondents have raised challenges, not yet addressed either by the Court of Appeals or in this opinion, to the jurisdiction or adequacy of the particular state proceeding at issue to adjudicate some or all of the rights asserted in the federal suit. These challenges remain open for consideration on remand. Moreover, the courts below should, if the need arises, allow whatever amendment of pleadings not prejudicial to other parties may be necessary to preserve in federal court those issues as to which the state forum lacks jurisdiction or is inadequate.

[21] We leave open for determination on remand whether the proper course in such cases is a stay of the federal suit or dismissal without prejudice. See *Moses H. Cone Hospital*, 460 U. S., at 28 (reserving issue). In either event, resort to the federal forum should remain available if warranted by a significant change of circumstances, such as, for example, a decision by a state court that it does not have jurisdiction over some or all of these claims after all.

[Indian] tribes and their reservation lands are insulated in some respects by a 'historic immunity from state and local control,' *Mescalero Apache Tribe* v. *Jones*, [411 U. S. 145, 152 (1973)], and tribes retain any aspect of their historical sovereignty not 'inconsistent with the overriding interests of the National Government.' *Washington* v. *Confederated Tribes*, [447 U.S 134, 153 (1980)]." Nor should we be understood to retreat from the general proposition, expressed in *Colorado River*, that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." 424 U. S., at 817. See generally *Moses H. Cone Hospital*, *supra*, at 13–16. But water rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute, and we cannot in this context be guided by general propositions.

We also emphasize, as we did in *Colorado River*, that our decision in no way changes the substantive law by which Indian rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment.

The judgment of the Court of Appeals in each of these cases is reversed, and the cases are remanded for further proceedings consistent with this opinion.[22]

So ordered.

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[22] The motion of the Blackfeet Indian Tribe, filed March 22, 1983, to suspend all proceedings in this Court respecting the water rights of the Blackfeet Indian Tribe, Browning, Mont., and to preclude the Solicitor General or any other attorney of the Department of Justice from purporting to represent that Tribe in these proceedings is denied. The motion of the White Mountain Apache Tribe and the Blackfeet Indian Tribe, filed June 3, 1983, for leave to file a motion to dismiss for lack of *in personam* and subject-matter jurisdiction in this Court over the state-court water rights adjudica-

JUSTICE MARSHALL, dissenting.

In *Colorado River Water Conservation District* v. *United States*, 424 U. S. 800 (1976), this Court recognized a narrow rule of abstention governing controversies involving federal water rights. We stated that in light of "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *id.*, at 817, "[o]nly the clearest of justifications," *id.*, at 819, will warrant abstention in favor of a concurrent state proceeding. Substantially for the reasons set forth in JUSTICE STEVENS' dissenting opinion, I believe that abstention is not appropriate in these cases. Unlike the federal suit in *Colorado River*, the suits here are brought by Indian Tribes on their own behalf. These cases thus implicate the strong congressional policy, embodied in 28 U. S. C. § 1362, of affording Indian tribes a federal forum. Since § 1362 reflects a congressional recognition of the "great hesitancy on the part of tribes to use State courts," S. Rep. No. 1507, 89th Cong., 2d Sess., 2 (1966), tribes which have sued under that provision should not lightly be remitted to asserting their rights in a state forum. Moreover, these cases also differ from *Colorado River* in that the exercise of federal jurisdiction here will not result in duplicative federal and state proceedings, since the District Court need only determine the water rights of the Tribes. I therefore cannot agree that this is one of those "exceptional" situations justifying abstention. 424 U. S., at 818.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

"Nothing in the McCarran Amendment or in its legislative history can be read as limiting the jurisdiction of the federal courts." *Colorado River Water Conservation District* v.

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tion proceedings is denied. Treating the papers whereon the motion filed June 3, 1983, was submitted as a motion for leave to file a brief *amicus curiae*, and treating the accompanying papers as a brief *amicus curiae*, leave to file the brief is granted.

United States, 424 U. S. 800, 821, n. 2 (1976) (Stewart, J., dissenting). That Amendment is a waiver, not a command.[1] It *permits* the United States to be joined as a defendant in state water rights adjudications; it does not purport to diminish the United States' right to litigate in a federal forum and it is totally silent on the subject of Indian tribes' rights to litigate anywhere. Yet today the majority somehow concludes that it commands the federal courts to defer to state-court water rights proceedings, even when Indian water rights are involved. Although it is customary for the Court to begin its analysis of questions of statutory construction by examining the text of the relevant statute,[2] one may search in vain for any textual support for the Court's holding today.

> "Most of the land in these reservations is and always has been arid. . . . It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation. It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised." *Arizona* v. *California*, 373 U. S. 546, 598–599 (1963).

This Court has repeatedly recognized that the Government, when it created each Indian reservation, "intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless." *Id.*, at 600. See *Winters* v. *United States*, 207 U. S. 564 (1908); *United States* v. *Powers*, 305 U. S. 527, 532 (1939); *Arizona* v. *California*, *supra*, at 600–601; *Cappaert* v. *United States*, 426 U. S. 128, 138–139 (1976). This doctrine, known as the *Winters* doctrine, is unquestionably a matter of *federal*, not state, law. See *ante*, at 571; *Colorado River*, *supra*, at 813. Its underlying principles differ substantially from those applied by the States to allocate water among competing claimants. Unlike state-law claims based on prior appropriation, Indian reserved water rights are not based on actual beneficial use and are not forfeited if they are not used. Vested no later than the date each reservation was created, these Indian rights are superior in right to all subsequent appropriations under state law. Not all of the issues arising from the application of the *Winters* doctrine have been resolved, because in the past the scope of Indian reserved rights has infrequently been adjudicated.[3] The important task of elaborating and clarifying these federal-law issues in the cases now before the Court, and in future cases, should be performed by federal rather than state courts whenever possible.

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[1] See *ante*, at 549, n. 1 (quoting the statutory text).

[2] See, *e. g.*, *BankAmerica Corp.* v. *United States*, 462 U. S. 122, 128–130 (1983); *Morrison-Knudsen Construction Co.* v. *Director, Office of Workers' Compensation Programs*, 461 U. S. 624, 630–632 (1983); *Griffin* v. *Oceanic Contractors, Inc.*, 458 U. S. 564 (1982); *Bread Political Action Committee* v. *FEC*, 455 U. S. 577, 580–581 (1982); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980).

Federal adjudication of Indian water rights would not fragment an otherwise unified state-court proceeding. Since Indian reserved claims are wholly dissimilar to state-law water claims, and since their amount does not depend on the total volume of water available in the water source or on the quantity of competing claims, it will be necessary to conduct separate proceedings to determine these claims even if the adjudication takes place in state court. Subsequently the state court will incorporate these claims—like claims under state law or Federal Government claims that have been formally adjudicated in the past—into a single inclusive, binding decree for each water source. Thus, as Justice Stewart wrote in dissent in *Colorado River:* "Whether the virtually identical separate proceedings take place in a federal court or a state court, the adjudication of the claims will be neither more nor less 'piecemeal.' Essentially the same process will be followed in each instance." 424 U. S., at 825.

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[3] See generally Note, Indian Reserved Water Rights: The *Winters* of Our Discontent, 88 Yale L. J. 1689, 1690–1701 (1979).

To justify virtual abandonment of Indian water rights claims to the state courts, the majority relies heavily on *Colorado River Water Conservation District*, which in turn discovered an affirmative policy of federal judicial abdication in the McCarran Amendment.[4] I continue to believe that *Colorado River* read more into that Amendment than Congress intended, and cannot acquiesce in an extension of its reasoning. Although the Court's decision in *Colorado River* did, indeed, foreshadow today's holding, it did not involve an Indian tribe's attempt to litigate on its own behalf, 424 U. S., at 820, n. 26. The majority today acknowledges that the question in these cases was "not directly answered," but in fact was "specifically reserved," in *Colorado River*. *Ante*, at 565.

Although in some respects Indian tribes' water claims are similar to other reserved federal water rights, different treatment is justified. States and their citizens may well be more antagonistic toward Indian reserved rights than other federal reserved rights, both because the former are potentially greater in quantity and because they provide few direct or indirect benefits to non-Indian residents.[5] Indians have historically enjoyed a unique relationship with the Federal Government, reflecting the tribes' traditional sovereign status, their treaty-based right to federal protection, and their special economic problems. Recently the Court reaffirmed "'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" *United States* v. *Mitchell*, *ante*, at 225, quoting *Seminole Nation* v. *United States*, 316 U. S. 286, 296 (1942). See also *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 168–175 (1973); *Rice* v. *Olson*, 324 U. S. 786, 789 (1945).[6]

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[4] Although giving lipservice to the balancing of factors set forth in *Colorado River*, the Court essentially gives decisive weight to one factor: the policy of unified water rights adjudication purportedly embodied in the McCarran Amendment. *Ante*, at 552, 569–570. The Court's entire discussion of the applicability in these cases of the four *Colorado River* factors is found in a single vague sentence. *Ante*, at 570. It is worth noting, however, that the Court leaves open the possibility that Indian water claims will occasionally be heard in federal court. *Ante*, at 569.

[5] See Comptroller General of the United States, Reserved Water Rights for Federal and Indian Reservations: A Growing Controversy in Need of Resolution 18 (Nov. 1978) ("Indian reserved water rights present a more pressing problem than Federal reserved water rights. Unlike Federal

One important aspect of the special relationship is 28 U. S. C. § 1362, which embodies a federal promise that Indian tribes will be able to invoke the jurisdiction of federal courts to resolve matters in controversy arising under federal

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reservations, which are not expected to have large consumptive water demands, many Indian reservations are expected to require significant water quantities to satisfy reservation purposes"). In addition, national forests, national parks, and other federal uses provide benefits to non-Indian residents, including lumbering operations, grazing, recreational purposes, watershed protection, and tourist revenues. See Note, Adjudication of Indian Water Rights Under the McCarran Amendment: Two Courts are Better Than One, 71 Geo. L. J. 1023, 1053–1054 (1983).

[6] Congress has been particularly solicitous of Indian property rights, including water rights, even when it has expanded the governmental role of the States with respect to Indian affairs. In 1953, a year after the McCarran Amendment was passed, Congress authorized the States to assume general criminal and limited civil jurisdiction within "Indian country," but it expressly withheld certain matters, including water rights, from state adjudication. Pub. L. 280, 67 Stat. 588, codified at 28 U. S. C. § 1360(b). The Court held in *Colorado River* that this proviso to Pub. L. 280 did not purport to limit the special consent to jurisdiction given by the McCarran Amendment. 424 U. S., at 812–813, n. 20. But, even assuming that state courts have jurisdiction to adjudicate Indian water claims, the proviso casts serious doubt on the assertion that Congress intended state courts to be the *preferred* forum.

law.[7] Congress thereby assured Indians a neutral federal forum—a guarantee whose importance should not be underestimated.[8] The Senate Report noted:

> "There is great hesitancy on the part of tribes to use State courts. This reluctance is founded partially on the traditional fear that tribes have had of the States in which their reservations are situated. Additionally, the Federal courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years." S. Rep. No. 1507, 89th Cong., 2d Sess., 2 (1966).

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[7] The statute provides:

"The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

Enacted in 1966, § 1362 was designed to remove the $ 10,000 jurisdictional amount limitation with respect to these claims.

[8] The majority recognizes that there is "a good deal of force" to the assertion that "[s]tate courts may be inhospitable to Indian rights." *Ante*, at 567, 566. Federal officials responsible for Indian affairs have consistently recognized the appropriateness of deciding Indian claims in federal, not state, courts. See, *e. g.*, H. R. Rep. No. 2040, 89th Cong., 2d Sess., 2 (1966) (describing position of Interior Department); National Water Comm'n, Water Policies for the Future, Final Report to the President and to the Congress of the United States 478–479 (1973). American Indian Policy Review Commission, Task Force Four, Report on Federal, State, and Tribal Jurisdiction 176 (Comm. Print 1976); American Indian Policy Review Commission, Final Report 333–334 (Comm. Print 1977).

Although the Court correctly observes that state courts, "as much as federal courts, have a solemn obligation to follow federal law," *ante*, at 571, state judges, unlike federal judges, tend to be elected and hence to be more conscious of the prevailing views of the majority. Water rights adjudications, which will have a crucial impact on future economic development in the West, are likely to stimulate great public interest and concern. See Note, *supra* n. 5, at 1052–1053.

Section 1362 also assured the tribes that they need not rely on the Federal Government to protect their interests, an important safeguard in light of the undeniable potential for conflicts of interest between Indian claims and other Federal Government claims.[9]

Despite the silence of the McCarran Amendment regarding Indian tribal claims, and the clear promise of a federal forum embodied in § 1362, the Court holds that considerations of "wise judicial administration" require that Indian claims, governed by federal law, must be relegated to the state courts. It is clear to me that the words "wise judicial administration" have been wrenched completely from their ordinary meaning. One of the Arizona proceedings, in which process has been served on approximately 58,000 known water claimants, illustrates the practical consequences of giving the state courts the initial responsibility for the adjudication of Indian water rights claims. Because this Court may not exercise appellate jurisdiction in state-court litigation until after a final judgment has been entered by the highest court of the State, no federal tribunal will be able to review any federal question in the case until the entire litigation has been concluded. The Court promises that "any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment." *Ante*, at 571. If a state court errs in interpreting the *Winters* doctrine or an Indian treaty, and this Court ultimately finds it necessary to correct that error, the entire comprehensive state-court water rights decree may require massive readjustment. If, however, the quantification of Indian rights were to be adjudicated in a separate federal proceeding—which presumably would be concluded long before the mammoth, conglomerate state adjudication comes to an end—the state judgment would rest on a solid foundation that this Court should never need to examine.

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[9] The Senate Report stated:

"Currently, the right of the Attorney General of the United States to bring civil actions on behalf of tribes without regard to jurisdictional amount, a power conferred on him by special statutes, is insufficient in those cases wherein the interest of the Federal Government as guardian of the Indian tribes and as Federal sovereign conflict, in which case the Attorney General will decline to bring the action.

"The proposed legislation will remedy these defects by making it possible for the Indian tribes to seek redress using their own resources and attorneys." S. Rep. No. 1507, at 2.

If federal courts defer to state-court proceedings, then the Indian tribes will be unable to represent themselves without waiving tribal sovereign immunity from state-court jurisdiction.

The Court acknowledges the logical force of these propositions, but sets them aside because the exercise of concurrent federal-court jurisdiction would create "the possibility of duplicative litigation, tension and controversy between the federal and state forums, hurried and pressured decisionmaking, and confusion over the disposition of property rights." *Ante*, at 569. These possibilities arise, as the Court candidly admits, from a pessimistic assessment of the likelihood that state courts, state legislatures, and state parties will assume a "cooperative attitude." In other words, the state courts might engage in an unseemly rush to judgment in order to give the Indians less water than they fear that the federal courts might provide. If state courts cannot be expected to adhere to orderly processes of decisionmaking because of their hostility to the Indians, the statutory right accorded to Indian tribes to litigate in a federal tribunal is even more important.

In my view, a federal court whose jurisdiction is invoked in a timely manner by an Indian tribe has a duty to determine the existence and extent of the tribe's reserved water rights under federal law. It is inappropriate to stay or dismiss such federal-court proceedings in order to allow determinations by state courts. In the cases before us today, complaints were timely filed in federal court by the Indian Tribes, before or shortly after the institution of state water adjudication proceedings; the state proceedings in Arizona and Montana remain at an early stage. The District Court should therefore grant the Tribes leave to amend the various complaints, where necessary, to seek adjudication of the scope and quantity of Indian reserved water rights and to eliminate other claims; the suits should then proceed in federal court.

Today, however, on the tenuous foundation of a perceived congressional intent that has never been articulated in statutory language or legislative history, the Court carves out a further exception to the "virtually unflagging obligation" of federal courts to exercise their jurisdiction. The Court does not—and cannot—claim that it is faithfully following general principles of law. After all, just four months ago in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1 (1983), the Court wrote:

> "[W]e emphasize that our task in cases such as this is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction. Although in some rare circumstances the presence of state-law issues may weigh in favor of that surrender . . . the presence of federal-law issues must always be a major consideration weighing against surrender." *Id.*, at 25–26.

Today that "major consideration" is but a peppercorn in the scales, outweighed by the phantom command of the McCarran Amendment. Instead of trying to reconcile this decision with *Moses H. Cone* and other prior cases, the Court merely says: "But water rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute, and we cannot in this context be guided by general propositions." *Ante,* at 571.

I submit that it is the analysis in Part IV of the Court's opinion that is "virtually unique." Accordingly, I respectfully dissent.

GUARDIANS ASSOCIATION ET AL. *v.* CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 81-431. Argued November 1, 1982—Decided July 1, 1983

Petitioner black and Hispanic police officers were appointed to the New York City Police Department upon achieving passing scores on the examinations administered to make entry-level appointments. Since appointments were made in order of test scores, however, the examinations caused blacks and Hispanics to be hired later than similarly situated whites, which lessened petitioner officers' seniority and related benefits. Accordingly, when the Department subsequently laid off police officers on a "last-hired, first-fired" basis, those officers who had achieved the lowest scores were laid off first, and petitioner officers were disproportionately affected by the layoffs. Petitioner officers and petitioner organizations then brought a class action in Federal District Court against respondents (the Department and other New York City officials and entities), alleging that the layoffs violated their rights under, *inter alia*, Titles VI and VII of the Civil Rights Act of 1964. Citing administrative regulations promulgated under Title VI, the District Court ultimately held that an implied private right of action existed under Title VI and that proof of discriminatory effect was enough to establish a violation of Title VI, thereby rejecting respondents' contention that only proof of discriminatory intent could suffice. The District Court granted certain relief under Title VII, and also granted the following relief under Title VI: (1) Each class member was awarded constructive seniority, including the right to backpay and back medical and insurance benefits which he would have received had he been appointed on his constructive seniority date; (2) respondents were directed to give a sergeant's examination to those class members whose constructive seniority would have entitled them to take the last such examination; and (3) respondents were ordered to consult with petitioners on the preparation and use of future examinations to insure that future hiring practices would be nondiscriminatory. The Court of Appeals affirmed the relief under Title VII, but reversed as to Title VI, holding that the awards of Title VI relief could not be sustained because proof of discriminatory intent was required.

Held: The judgment is affirmed.

633 F. 2d 232, affirmed.

JUSTICE WHITE concluded that discriminatory intent is not an essential element of a Title VI violation. JUSTICE WHITE, joined by JUSTICE REHNQUIST, also concluded that a private plaintiff should recover only injunctive, noncompensatory relief for a defendant's unintentional violation of Title VI, that such relief should not include an award of constructive seniority, and that the Court of Appeals' judgment should be affirmed on this basis, since the relief denied petitioners under that judgment is unavailable to them under Title VI. Pp. 593–607.

JUSTICE POWELL, joined by THE CHIEF JUSTICE, would affirm the Court of Appeals' judgment on the ground that private suits to enforce Title VI are not authorized or, joined by THE CHIEF JUSTICE and JUSTICE REHNQUIST, would affirm the judgment on the alternative ground that the Court of Appeals correctly held that a showing of intentional discrimination is a prerequisite to a successful Title VI claim. Pp. 608–611.

JUSTICE O'CONNOR would affirm the Court of Appeals' judgment on the ground that proof of purposeful discrimination is a necessary element of a valid Title VI claim and that hence implementing regulations incorporating an impact standard are not valid. Pp. 612–615.

WHITE, J., announced the judgment of the Court and delivered an opinion, in Parts I, III, IV, and V of which REHNQUIST, J., joined. POWELL, J., filed an opinion concurring in the judgment, in which BURGER, C. J., joined, and in Part II of which REHNQUIST, J., joined, *post*, p. 607. REHNQUIST, J., *post*, p. 612, and O'CONNOR, J., *post*, p. 612, filed opinions concurring in the judgment. MARSHALL, J., filed a dissenting opinion, *post*, p. 615. STEVENS, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 635.

Christopher Crowley argued the cause for petitioners. With him on the briefs was *Kenneth Kimerling*.

Leonard Koerner argued the cause for respondents. With him on the brief was *Frederick A. O. Schwarz, Jr.**

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*Briefs of *amici curiae* urging reversal were filed by *Arthur N. Eisenberg* and *E. Richard Larson* for the American Civil Liberties Union et al.; and by *Vilma S. Martinez*, *Morris J. Baller*, and *Roger L. Waldman* for the Asian American Legal Defense and Education Fund et al.

Robert E. Williams, *Douglas S. McDowell*, and *Thomas R. Bagby* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging affirmance.

*[Footnote * is continued on p. 584]*

JUSTICE WHITE announced the judgment of the Court and delivered an opinion, in Parts I, III, IV, and V of which JUSTICE REHNQUIST joined.

The threshold issue before the Court is whether the private plaintiffs in this case need to prove discriminatory intent to establish a violation of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U. S. C. § 2000d *et seq.*,[1] and administrative implementing regulations promulgated thereunder. I conclude, as do four other Justices, in separate opinions, that the Court of Appeals erred in requiring proof of discriminatory intent.[2] However, I conclude that the judgment below should be affirmed on other grounds, because, in the absence of proof of discriminatory animus, compensatory relief should not be awarded to private Title VI plaintiffs; unless discriminatory intent is shown, declaratory and limited injunctive relief should be the only available private remedies for Title VI violations. There being four other Justices who would affirm the judgment of the Court of Appeals, that judgment is accordingly affirmed.

Thomas I. Atkins and *Michael H. Sussman* filed a brief for the NAACP as *amicus curiae*.

[1] Section 601 of the Act, 78 Stat. 252, 42 U. S. C. § 2000d, provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

[2] The five of us reach the conclusion that the Court of Appeals erred by different routes. JUSTICE STEVENS, joined by JUSTICE BRENNAN and JUSTICE BLACKMUN, reasons that, although Title VI itself requires proof of discriminatory intent, the administrative regulations incorporating a disparate-impact standard are valid. *Post*, at 642–645. JUSTICE MARSHALL would hold that, under Title VI itself, proof of disparate-impact discrimination is all that is necessary. *Post*, at 623. I agree with JUSTICE MARSHALL that discriminatory animus is not an essential element of a violation of Title VI. I also believe that the regulations are valid, even assuming, *arguendo*, that Title VI, in and of itself, does not proscribe disparate-impact discrimination. Part II, *infra*.

I

This class action involves a challenge by black and Hispanic police officers, petitioners here,[3] to several written examinations administered by New York City between 1968 and 1970 that were used to make entry-level appointments to the city's Police Department (Department) through October 1974.[4] The District Court found that the challenged examinations had a discriminatory impact on the scores and pass-rates of blacks and Hispanics and were not job-related. These findings were not disturbed in the Court of Appeals.

Each member of the plaintiff class seeking relief from discrimination achieved a passing score on one of the challenged examinations and was hired as a police officer. Since appointments were made in order of test scores, however, the examinations caused the class members to be hired later than similarly situated whites, which lessened the petitioners' seniority and related benefits. Accordingly, when the Department laid off police officers in June 1975 on a "last-hired, first-fired" basis, those officers who had achieved the lowest scores on the examinations were laid off first, and the plaintiff black and Hispanic officers were disproportionately affected by the layoffs.

On April 30, 1976, petitioners filed the present suit[5] against the Department and other New York City officials and entities, the respondents here. Petitioners' amended complaint alleged that the June 1975 layoffs violated their rights under Titles VI and VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.*, and § 2000e *et seq.*, under 42 U. S. C. § 1983, and under various other state and federal laws.[6] The primary allegation of the complaint was that but for the discriminatory impact of the challenged examinations upon minorities, petitioners would have been hired earlier and therefore would have accumulated sufficient seniority to withstand the layoffs.

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[3] The class representatives are The Guardians Association of the New York City Police Department, Inc., The Hispanic Society of the New York City Police Department, Inc., Oswaldo Perez, and Felix E. Santos.

[4] Petitioners also alleged that the Department's 5' 7" minimum height requirement discriminated against Hispanics. The disposition of this issue in the lower courts is not now before us.

[5] This was petitioners' second judicial attack on the Department's use of the examinations. Petitioners first filed suit in 1972, but the District Court denied their motion for a preliminary injunction restraining the making of appointments from the ranked eligibility lists generated by the challenged examinations, on the basis that the eligibility lists would soon be

After a hearing, the District Court held that, although petitioners had failed to prove that the respondents had acted with discriminatory intent, the use of the examinations violated Title VII, because the tests had a disparate impact upon minorities and were not proved by respondents to be job-related.[7] The court therefore granted petitioners' motion for a preliminary injunction restraining the Department from firing or recalling any police officers until seniority lists were reordered to accord petitioners the seniority they would have had but for respondents' discriminatory practices. 431 F. Supp. 526 (SDNY 1977). In light of its holding under

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fully exhausted. The Court of Appeals affirmed. *Guardians Assn.* v. *Civil Service Comm'n*, 490 F. 2d 400 (CA2 1973). Petitioners unsuccessfully sought to revive the earlier case before filing the present suit. See 633 F. 2d 232, 235 (CA2 1980).

[6] Among these was a claim under 42 U. S. C. § 1981, which the District Court twice rejected because petitioners failed to prove discriminatory intent, which the court found to be a necessary element of a § 1981 cause of action. 431 F. Supp. 526, 534 (SDNY 1977); 466 F. Supp. 1273, 1276, n. 4 (SDNY 1979). The Court of Appeals affirmed. 633 F. 2d, at 263–268. Petitioners raised this § 1981 issue in their petition for certiorari, but they abandoned it after our decision last Term in *General Building Contractors Assn., Inc.* v. *Pennsylvania*, 458 U. S. 375 (1982), resolved the issue adversely to them. See Reply Brief for Petitioners 1, n.

[7] The District Court correctly relied on *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), and its progeny, as the framework for its Title VII disparate-impact analysis. 431 F. Supp., at 538–539.

Title VII, the District Court deemed it unnecessary to decide the merits of petitioners' claims under Title VI. *Id.*, at 530, n. 2.

On respondents' appeal, the Second Circuit vacated the District Court's decision and remanded the case for reconsideration in light of our holding in *Teamsters* v. *United States*, 431 U. S. 324 (1977), in which we ruled that a bona fide seniority system that merely perpetuates the effects of pre-Title VII discrimination is protected by § 703(h) of that statute, 42 U. S. C. § 2000e–2(h). 562 F. 2d 38 (1977). On remand, the District Court found that *Teamsters* had rendered its previous holding untenable to the extent that it granted relief with respect to discrimination occurring prior to March 24, 1972, the date on which Title VII became applicable to municipalities. See Pub. L. 92–261, § 2(1), 86 Stat. 103. This meant that, under Title VII, class members hired prior to the effective date were not entitled to any relief, and that the remaining members of the class were only entitled to back seniority awards that did not take into account time periods prior to that date. 466 F. Supp. 1273, 1280 (SDNY 1979).

The court then turned to Title VI, which has been applicable to municipalities since its enactment in 1964, to see if it would provide relief for the time periods prior to March 24, 1972. After considering *Cort* v. *Ash*, 422 U. S. 66 (1975), and the various opinions in *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978), the District Court concluded that an implied private right of action exists under Title VI. 466 F. Supp., at 1281–1285. Then, citing *Lau* v. *Nichols*, 414 U. S. 563 (1974), and Title VI administrative interpretative regulations adopted by several federal agencies, the court reasoned that proof of discriminatory effect is enough to establish a violation of Title VI in a private action, thereby rejecting respondents' contention that only proof of discriminatory intent could suffice. 466 F. Supp., at 1285–1287. Finally, turning to the question of relief, the court held that the same remedies available under Title VII should be available under Title VI, unless they would conflict with some purpose peculiar to Title VI. "In the instant case, back seniority, approved as a Title VII remedy in *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 . . . (1976), is just as necessary to make discriminatees 'whole' under Title VI." *Id.*, at 1287.

Accordingly, relief was granted to the entire class pursuant to Title VI. In a subsequent order, the court set forth a detailed plan for the determination of the constructive seniority to which each individual member of the class would be entitled, and the corresponding monetary and nonmonetary entitlements that would be derived therefrom. The court also ordered respondents to meet and consult with petitioners on the preparation and use of future examinations. App. A99–A107.

Respondents appealed once again to the Second Circuit, which affirmed the relief under Title VII but reversed as to Title VI. 633 F. 2d 232 (1980). All three members of the panel agreed that the award of Title VI relief could not be sustained, but the panel divided on the rationale for this conclusion. Two judges held that the trial court erred by concluding that Title VI does not require proof of discriminatory intent. They believed that this Court's decision in *Lau* v. *Nichols*, *supra*, which held that proof of discriminatory impact could suffice to establish a Title VI violation, had been implicitly overruled by the judgment and supporting opinions in *Bakke*, *supra*. 633 F. 2d, at 270 (Kelleher, J.); *id.*, at 274–275 (Coffrin, J.).

The third member of the panel, Judge Meskill, declined to reach the question whether Title VI requires proof of discriminatory intent. Instead, he concluded that the "compensatory remedies sought by and awarded to plaintiffs in the case at bar are not available to private litigants under Title VI." *Id.*, at 255. Nothing in the legislative history, Judge Meskill observed, indicated that Title VI was intended to compensate individuals excluded from the benefits of a program receiving federal assistance, and in his view a compensatory private remedy would work at cross-purposes with the administrative enforcement mechanism expressly provided by § 602 of Title VI, 42 U. S. C. § 2000d–1, and with the objectives of the federal assistance statutes. 633 F. 2d, at 255–262.[8]

After the Second Circuit denied petitions for rehearing from both sides, 633 F. 2d 232 (1980), we granted the plaintiffs' petition for certiorari, 454 U. S. 1140,[9] which claimed error solely on the basis that proof of discriminatory intent is not required to establish a Title VI violation.

II

The Court squarely held in *Lau* v. *Nichols*, *supra*, that Title VI forbids the use of federal funds not only in programs that intentionally discriminate on racial grounds but also in those endeavors that have a disparate impact on racial minorities. The Court of Appeals recognized this but was of the view, as are respondents, that *University of California Regents* v. *Bakke*, *supra*, had confined the reach of Title VI to those programs that are operated in an intentionally discriminatory manner. For two reasons, I disagree with this reading of *Bakke*.

A

First, I recognize that in *Bakke* five Justices, including myself, declared that Title VI on its own bottom reaches no further than the Constitution,[10] which suggests that, in light of *Washington* v. *Davis*, 426 U. S. 229 (1976), Title VI does not of its own force proscribe unintentional racial discrimination. The Court of Appeals thought these declarations were inconsistent with *Lau*'s holding that Title VI contains its own prohibition of disparate-impact racial discrimination. The issue in *Bakke*, however, was whether Title VI forbids intentional discrimination in the form of affirmative action intended to remedy past discrimination, even though such affirmative action is permitted by the Constitution. Holding that Title VI does not bar such affirmative action if the Constitution does not is plainly not determinative of whether Title VI proscribes unintentional discrimination in addition to the intentional discrimination that the Constitution forbids.

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[8] The panel majority disagreed with Judge Meskill's views, reading our decisions in *Bakke* and *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979), as allowing a private right of action under Title VI irrespective of the compensatory effect of the relief sought or granted. Also, fearing that part of the noncompensatory relief in the District Court's order might not be available to the entire class under Title VII, the court could not agree with Judge Meskill's conclusion that his rationale made it unnecessary to decide whether Title VI requires proof of discriminatory intent. 633 F. 2d, at 274.

[9] Respondents also filed a petition for certiorari, in which they seek review of the Court of Appeals' determination that the plaintiff class is entitled to relief under Title VII. *Civil Service Comm'n of the City of New York* v. *Guardians Assn.*, No. 81–432.

It is sensible to construe Title VI, a statute intended to protect racial minorities, as not forbidding those intentional, but benign, racial classifications that are permitted by the Constitution, yet as proscribing burdensome, nonbenign discriminations of a kind not contrary to the Constitution. Although some of the language in the *Bakke* opinions has a broader sweep, the holdings in *Bakke* and *Lau* are entirely consistent. Absent some more telling indication in the *Bakke* opinions that *Lau* was being overruled, I would not so hold.[11]

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[10] See *University of California Regents* v. *Bakke*, 438 U. S., at 287 (POWELL, J.); *id.*, at 328 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.).

[11] JUSTICE STEVENS correctly states that "when the Court unequivocally rejects one reading of a statute, its action should be respected in future litigation. . . . If a statute is to be amended after it has been authoritatively construed by this Court, that task should almost always be performed by Congress." *Post*, at 641. However, JUSTICE STEVENS appears to ignore his own admonition by disregarding the square holding of *Lau* v. *Nichols*, the only case that directly addressed the present issue. In *Lau*, we "unequivocally reject[ed]" the notion that Title VI requires proof of discriminatory intent. Since Congress has chosen not to modify

B

Even if I am wrong in concluding that *Bakke* did not overrule *Lau*, as so many of my colleagues believe, there is another reason for holding that disproportionate-impact discrimination is subject to the Title VI regime. In *Lau*, the Court was unanimous in affirming a holding that the school district there involved was forbidden by Title VI to practice unintentional as well as intentional discrimination against racial minorities. Five Justices were of the view that Title VI itself forbade impact discrimination. *Lau*, 414 U. S., at 566–569. Justice Stewart, joined by THE CHIEF JUSTICE and JUSTICE BLACKMUN, concurred in the result. The concurrence stated that it was not at all clear that Title VI, standing alone, would prohibit unintentional discrimination, but that the Title VI implementing regulations, which explicitly forbade impact discrimination, were valid because not inconsistent with the purposes of Title VI. *Id.*, at 569–571.[12] Even if *Bakke* must be taken as overruling *Lau*'s holding that the statute itself does not reach disparate impact, none of the five Justices whose opinions arguably compel this result considered whether the statute would permit regulations that clearly reached such discrimination. And no Justice in *Bakke* took issue with the view of the three concurring Justices in *Lau*, who concluded that even if Title VI itself did not proscribe unintentional racial discrimina-

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Title VI after it was "authoritatively construed" in *Lau*, we should be especially slow to adopt a new construction of the statute at this late date.

[12] Section 602 of Title VI, 78 Stat. 252, 42 U. S. C. § 2000d–1, empowers agencies providing federal financial assistance to issue "rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance . . . ." Justice Stewart explained that the regulations therefore should be upheld as valid, because they were "'"reasonably related to the purposes of the enabling legislation."'" *Lau* v. *Nichols*, 414 U. S., at 571 (opinion concurring in result) (quoting *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356, 369 (1973), in turn quoting *Thorpe* v. *Housing Authority of City of Durham*, 393 U. S. 268, 280–281 (1969)).

tion, it nevertheless permitted federal agencies to promulgate valid regulations with such effect. The upshot of Justice Stewart's opinion was that those charged with enforcing Title VI had sufficient discretion to enforce the statute by forbidding unintentional as well as intentional discrimination. Nothing that was said in *Bakke* is to the contrary.

Of course, this leaves the question whether THE CHIEF JUSTICE, Justice Stewart, and JUSTICE BLACKMUN were correct in their reading of the statute. I am convinced that they were. The language of Title VI on its face is ambiguous; the word "discrimination" is inherently so. It is surely subject to the construction given the antidiscrimination proscription of Title VII in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), at least to the extent of permitting, if not requiring, regulations that reach disparate-impact discrimination. As Justice Stewart pointed out, the federal agency given enforcement authority had consistently construed Title VI in that manner. *Lau*, *supra*, at 570 (opinion concurring in result). Moreover, soon after the passage of Title VI, the Department of Justice, which had helped draft the legislation, assisted seven agencies in the preparation of regulations incorporating the disparate-impact standard of discrimination.[13] These regulations were early interpretations of the statute by the agencies charged with its enforcement, and we should not reject them absent clear inconsistency with the face or structure of the statute, or with the unmistakable mandate of the legislative history. *Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 450 (1978). I discern nothing in the legislative history of Title VI, and nothing has been presented by respondents, that is at odds with the administrative construction of the statutory terms. The Title, furthermore, has been consistently administered in this manner for almost two decades without interference by Congress.[14] Under these circumstances, it must be concluded that Title VI reaches unintentional, disparate-impact discrimination as well as deliberate racial discrimination.

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[13] See 29 Fed. Reg. 16274–16305 (1964). As JUSTICE MARSHALL notes, *post*, at 619, shortly after these initial regulations were promulgated, every Cabinet department and about 40 federal agencies adopted Title VI regulations prohibiting disparate-impact discrimination.

III

Although the Court of Appeals erred in construing Title VI, it does not necessarily follow that its judgment should be reversed. As an alternative ground for affirmance, respondents defend the judgment on the basis that there is no private right of action available under Title VI that will afford petitioners the relief that they seek.[15] I agree that the relief denied petitioners under Title VII is unavailable to them under Title VI, at least where no intentional discrimination has been proved, as is the case here.

A

I deal first with the matter of a private cause of action under Title VI. In *Lau* v. *Nichols*, non-English-speaking Chinese students sought relief against the San Francisco School District, claiming that they should be taught the English language, that instruction should proceed in Chinese, or that some other way should be provided to afford them equal educational opportunity. This Court, reversing the Court of Appeals, gave relief under Title VI. The existence of a private cause of action under that Title, however, was not disputed in that case.

Four years later, the Court decided *University of California Regents* v. *Bakke*, which also involved a private suit seeking relief under Title VI against state educational authorities. Four Justices assumed, but did not decide, that a private action was available under Title VI.[16] A fifth Justice was of the view that no private cause of action could be implied under the Title.[17] The four remaining Justices concluded that a private action was available.[18]

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[14] JUSTICE MARSHALL details, *post*, at 620, how Congress has rebuffed efforts to overturn the Title VI disparate-impact regulations, and how Congress, with full awareness of how the agencies were interpreting Title VI, has modeled later statutes on § 601 of Title VI, thus indicating approval of the administrative definition. Cf. *Bob Jones University* v. *United States*, 461 U. S. 574 (1983); *Haig* v. *Agee*, 453 U. S. 280, 291–300 (1981) (agency interpretation of a statute may be confirmed or ratified by congressional inaction).

[15] See Brief for Respondents 8–9; Tr. of Oral Arg. 21–22.

Still later, in *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979), the Court, applying the factors specified in *Cort* v. *Ash*, 422 U. S. 66 (1975), held that private parties could sue to enforce the prohibitions of Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681 *et seq.*, against gender-based discrimination in any educational program supported by federal funds. A major part of the analysis was that Title IX had been derived from Title VI, that Congress understood that private remedies were available under Title VI, and that Congress intended similar remedies to be available under Title IX. 441 U. S., at 694–703. Furthermore, it was the unmistakable thrust of the *Cannon* Court's opinion that the congressional view was correct as to the availability of private actions to enforce Title VI. *Id.*, at 710–716. Two Justices, in dissent, were of the view that private remedies under Title VI itself were not available and that the same was true under Title IX. Those Justices, however, asserted that 42 U. S. C. § 1983 was available to enforce the proscriptions of Title VI and Title IX where the alleged discriminatory practices were being carried on under the color of state law. *Id.*, at 717–730 (WHITE, J., dissenting, joined by BLACKMUN, J.). Thus at least eight Justices in *Cannon* were of the view that Title VI and Title IX could be enforced in a private action against a state or local agency receiving federal funds, such as the respondent Department.[19] See also *Maine* v. *Thiboutot*, 448 U. S. 1 (1980).

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[16] *Bakke*, 438 U. S., at 281–284 (POWELL, J.); *id.*, at 328 (BRENNAN, MARSHALL, and BLACKMUN, JJ.).

[17] *Id.*, at 379 (WHITE, J.). This Justice, however, was of the view that where the alleged discriminatory conduct constitutes state action, a cause of action under 42 U. S. C. § 1983 is available.

[18] *Id.*, at 419–421, 420, n. 28 (STEVENS, J., joined by BURGER, C. J., and Stewart and REHNQUIST, JJ.).

B

Petitioners, however, are not entitled to a "make whole" remedy for respondents' Title VI violations. Whether a litigant has a cause of action "is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." *Davis* v. *Passman*, 442 U. S. 228, 239 (1979). The usual rule is that where legal rights have been invaded and a cause of action is available, a federal court may use any available remedy to afford full relief. *Bell* v. *Hood*, 327 U. S. 678, 684 (1946). The general rule nevertheless yields where necessary to carry out the intent of Congress or to avoid frustrating the purposes of the statute involved.

For example, in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11 (1979), the Court found that a private right of action for only limited relief could be implied under the Investment Advisers Act of 1940, 15 U. S. C. § 80b–1 *et seq.*, which prohibits certain practices in connection with investment advisory contracts. Section 215 of the Act declared that contracts whose formation or performance would violate the Act were void, and the Court concluded that Congress intended "that the customary legal incidents of voidness would follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract." 444 U. S., at 19. But the Court refused to allow recovery of monetary relief in a private suit alleging violations of the Act, stating that, in the absence of a contrary legislative intent, "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Ibid.*

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[19] One Justice disagreed with the Court's holding that a private right of action could be implied under Title IX itself, without expressing a view as to whether Title IX could be privately enforced via § 1983. 441 U. S., at 730–749 (POWELL, J., dissenting).

We have also indicated that "make whole" remedies are not ordinarily appropriate in private actions seeking relief for violations of statutes passed by Congress pursuant to its "power under the Spending Clause to place conditions on the grant of federal funds." *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 15 (1981). This is because the receipt of federal funds under typical Spending Clause legislation is a consensual matter: the State or other grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt. Typically, before funds are advanced, the appropriate federal official will determine whether the grantee's plan, proposal, or program will satisfy the conditions of the grant or other extension of federal funds, and the grantee will have in mind what its obligations will be. When in a later private suit brought by those for whose benefit the federal money was intended to be used it is determined, contrary to the State's position, that the conditions attached to the funds are not being complied with, it may be that the recipient would rather terminate its receipt of federal money than assume the unanticipated burdens.

Thus, the Court has more than once announced that in fashioning remedies for violations of Spending Clause statutes by recipients of federal funds, the courts must recognize that the recipient has "alternative choices of assuming the additional costs" of complying with what a court has announced is necessary to conform to federal law or of "not using federal funds" and withdrawing from the federal program entirely. *Rosado* v. *Wyman*, 397 U. S. 397, 420–421 (1970). Although a court may identify the violation and enjoin its continuance or order recipients of federal funds prospectively to perform their duties incident to the receipt of federal money, the recipient has the option of withdrawing and hence terminating the prospective force of the injunction.

Pennhurst State School and Hospital v. *Halderman*, *supra*, reiterated the *Rosado* approach: Remedies to enforce spending power statutes must respect the privilege of the recipient of federal funds to withdraw and terminate its receipt of federal money rather than assume the further obligations and duties that a court has declared are necessary for compliance. 451 U. S., at 29–30, 30, n. 23; *id.*, at 53–55 (WHITE, J., dissenting in part). The Court noted that "in no [Spending Clause] case . . . have we required a State to provide money to plaintiffs, much less required" a State to assume more burdensome obligations. *Id.*, at 29.

IV

Since the private cause of action under Title VI is one implied by the judiciary rather than expressly created by Congress, we should respect the foregoing considerations applicable in Spending Clause cases and take care in defining the limits of this cause of action and the remedies available thereunder. Because it was found that there was no proof of intentional discrimination by respondents, I put aside for present purposes those situations involving a private plaintiff who is entitled to the benefits of a federal program but who has been intentionally discriminated against by the administrators of the program. In cases where intentional discrimination has been shown, there can be no question as to what the recipient's obligation under the program was and no question that the recipient was aware of that obligation. In such situations, it may be that the victim of the intentional discrimination should be entitled to a compensatory award, as well as to prospective relief in the event the State continues with the program.[20]

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[20] It is not uncommon in the law for the extent of a defendant's liability to turn on the extent of his knowledge or culpability. Thus, it has been said that, under principles of contract law, a contracting party cannot be held liable for extraordinary harm due to special circumstances unless, at the

However that may be, the Court of Appeals in this case did not disturb the District Court's finding that there was no intentional discrimination on racial grounds. The discrimination was unintentional and resulted from the disproportionate impact of the entry-level tests on racial minorities. In this and similar situations, it is not immediately obvious what the grantee's obligations under the federal program were and it is surely not obvious that the grantee was aware that it was administering the program in violation of the statute or regulations. In such cases, proof of discriminatory impact does not end the matter. If the grantee can bear the burden of proving some "business necessity" for practices that have discriminatory impact, it has a complete affirmative defense to claims of violation. *Griggs* v. *Duke Power Co.*, 401 U. S., at 431. In the typical case where deliberate discrimination on racial grounds is not shown, the recipient will have at least colorable defenses to charges of illegal disparate-impact discrimination, and it often will be the case that, prior to judgment, the grantee will not have known or have had compelling reason to know that it had been violating the federal standards. Hence, absent clear congressional intent or guidance to the contrary, the relief in private actions should be limited to declaratory and injunctive relief ordering future compliance with the declared statutory and regulatory obligations. Additional relief in the form of money or otherwise based on past unintentional violations should be withheld.

The foregoing considerations control decision in this case. I note first that Title VI is spending-power legislation:

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time the contract was made, he knew or had reason to know the circumstances that made such extraordinary injury probable "so as to have the opportunity of judging for himself as to the degree of this probability." 5 A. Corbin, Contracts § 1014 (1964). See also *id.*, §§ 1006–1019; 11 W. Jaeger, Williston on Contracts § 1344A (3d ed. 1968). And in tort law, usually only persons who have intentionally or recklessly violated another's rights are liable for punitive damages. See *Smith* v. *Wade*, 461 U. S. 30 (1983); W. Prosser, Law of Torts 9–10 (4th ed. 1971).

> "It is not a regulatory measure, but an exercise of the unquestioned power of the Federal Government to 'fix the terms on which Federal funds shall be disbursed.' *Oklahoma* v. *Civil Service Commission*, 330 U. S. 127, 143 (1947). No recipient is required to accept Federal aid. If he does so voluntarily, he must take it on the conditions on which it is offered." 110 Cong. Rec. 6546 (1964) (Sen. Humphrey).

Accord, *id.*, at 1527 (memorandum by Rep. Celler) (validity of Title VI "rests on the power of Congress to fix the terms on which Federal funds will be made available"); *id.*, at 6562 (Sen. Kuchel); *id.*, at 7063 (Sen. Pastore). Title VI rests on the principle that "taxpayers' money, which is collected without discrimination, shall be spent without discrimination." *Id.*, at 7064 (Sen. Ribicoff). Accord, *id.*, at 7054–7055, 7062 (Sen. Pastore); *id.*, at 7102 (Sen. Javits); *id.*, at 6566 (memorandum by the Republican Members of the House Committee on the Judiciary). The mandate of Title VI is "[v]ery simple. Stop the discrimination, get the money; continue the discrimination, do not get the money." *Id.*, at 1542 (Rep. Lindsay). Title VI imposes no obligations but simply "'extends an option'" that potential recipients are free to accept or reject. *Id.*, at 1527 (memorandum by Rep. Celler) (quoting *Massachusetts* v. *Mellon*, 262 U. S. 447, 480 (1923)). This legislative history clearly shows that Congress intended Title VI to be a typical "contractual" spending-power provision.

Since Title VI is Spending Clause legislation, it is presumed that private litigants seeking to enforce compliance with its terms are entitled to no more than the limited remedy deemed available to the plaintiffs in *Pennhurst*. The inquiry is not at this point complete, however, because, like all rules of statutory construction, the *Pennhurst* presumption must "yield . . . to persuasive evidence of contrary legislative intent." *Transamerica*, 444 U. S., at 20. As in *Transamerica*, however, the relevant legislative history of Title VI reveals that "what evidence of intent exists in this case, circumstantial though it may be, weighs against the implication of a private right of action for a monetary award in a case such as this," *ibid.*, at least absent proof of intentional discrimination.

Title VI does not explicitly allow for *any* form of a private right of action. This fact did not go unnoticed by Senators Keating and Ribicoff, who unsuccessfully proposed an amendment adding to Title VI a provision expressly allowing the institution of "a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, . . . by the person aggrieved." 109 Cong. Rec. 15375 (1963). Senator Keating explained that, under this proposal, if someone violated Title VI, funds could be denied or "a suit for specific performance of the nondiscrimination requirement could be brought . . . by the victim of the discrimination." *Id.*, at 15376. The relevant language of the proposed amendment was identical to that of § 204(a) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a–3(a), the provision creating a private right of action to enforce Title II of the Act, which deals with discrimination in public accommodations. Suits under § 204(a) are "private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Newman* v. *Piggie Park Enterprises*, 390 U. S. 400, 401–402 (1968). Senator Keating thought that elementary fairness required that victims of Title VI-proscribed discrimination be accorded the same private right of action as allowed in the "proposed education and public accommodations titles of the [Civil Rights] bill."[21]

The Keating-Ribicoff proposal was not included in Title VI, but the important point for present purposes is that even the most ardent advocates of private enforcement of Title VI contemplated that private plaintiffs would only be awarded "preventive relief." Like the drafters of Title II, they did not intend to allow private plaintiffs to recover monetary awards. Although the expressed intent of Senators Keating and Ribicoff is alone not determinative of whether a compensatory remedy may be obtained in a private action to enforce Title VI, "it is one more piece of evidence that Congress did not intend to authorize a cause of action for anything beyond limited equitable relief." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, at 22. Surely, it did not intend to do so where intentional discrimination is not shown.

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[21] Hearings on S. 1731 and S. 1750 before the Senate Committee on the Judiciary, 88th Cong., 1st Sess., 335 (1963) (Sen. Keating).

The remaining indications of congressional intent are also circumstantial, but they all militate in favor of the conclusion that only prospective relief ordering compliance with the terms of the grant is appropriate as a private remedy for Title VI violations in cases such as this. The "greatest possible emphasis" was given to the fact that the "real objective" of Title VI was "the elimination of discrimination in the use and receipt of Federal funds." 110 Cong. Rec. 6544 (1964) (Sen. Humphrey). See also *id.*, at 7062 (Sen. Pastore). The remedy of termination of assistance was regarded as "a last resort, to be used only if all else fails," because "cutoffs of Federal funds would defeat important objectives of Federal legislation, without commensurate gains in eliminating racial discrimination or segregation." *Id.*, at 6544, 6546 (Sen. Humphrey).[22]

To ensure that this intent would be respected, Congress included an explicit provision in § 602 of Title VI that requires that any administrative enforcement action be "consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." 42 U. S. C. § 2000d–1. Although an award of damages would not be as drastic a remedy as a cutoff of funds, the possibility of large monetary liability for unintended discrimination might well dissuade potential nondiscriminating recipients from participating in federal programs, thereby hindering the objectives of the funding statutes. See 633 F. 2d, at 261–262 (opinion of Meskill, J.).

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[22] See also, *e. g.*, 110 Cong. Rec. 1520 (1964) (Rep. Celler); *id.*, at 7063 (Sen. Pastore); *id.*, at 7065 (Sen. Ribicoff).

In summary, there is no legislative history that in any way rebuts the *Pennhurst* presumption that only limited injunctive relief should be granted as a remedy for unintended violations of statutes passed pursuant to the spending power. What little evidence there is evinces an intent not to allow any greater relief.[23] I conclude that compensatory relief, or other relief based on past violations of the conditions attached to the use of federal funds, is not available as a private remedy for Title VI violations not involving intentional discrimination.[24]

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[23] The lower courts are generally in agreement that it is not appropriate to award monetary damages for Title VI violations. See *Lieberman* v. *University of Chicago*, 660 F. 2d 1185 (CA7 1981) (Title IX case), cert. denied, 456 U. S. 937 (1982); *Drayden* v. *Needville Independent School District*, 642 F. 2d 129, 133 (CA5 1981); *Nabke* v. *HUD*, 520 F. Supp. 5, 10–11 (WD Mich. 1981); *Concerned Tenants Assn.* v. *Indian Trails Apartments*, 496 F. Supp. 522, 526–527 (ND Ill. 1980); *Rendon* v. *Utah State Dept. of Employment Security Job Service*, 454 F. Supp. 534 (Utah 1978). See also C. Antieau, Federal Civil Rights Acts § 317 (1980); 2 N. Dorsen, P. Bender, B. Neuborne, & S. Law, Political and Civil Rights in the United States 608 (4th ed. 1979). But cf. *Miener* v. *Missouri*, 673 F. 2d 969, 977–979 (CA8 1982) (holding that damages may be recovered under § 504 of the Rehabilitation Act of 1973, which was considered to be "closely analogous" to Title VI); *Gilliam* v. *City of Omaha*, 388 F. Supp. 842 (Neb.) (dicta), aff'd without mention of remedies, 524 F. 2d 1013 (CA8 1975); *Quiroz* v. *City of Santa Ana*, 18 FEP Cases 1138 (CD Cal. 1978) (dicta); *Flanagan* v. *President & Directors of Georgetown College*, 417 F. Supp. 377 (DC 1976) (dicta).

JUSTICE STEVENS argues, *post*, at 638, that even if Title VI authorizes only a limited remedy, full relief is available in this case because the petitioners "sought relief under 42 U. S. C. § 1983," and § 1983 "provides a damages remedy." Damages indeed are usually available in a § 1983 action, but such is not the case when the plaintiff alleges only a deprivation of rights secured by a Spending Clause statute. Thus, in *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 27–29 (1981), the Court indicated that, even if the plaintiffs were entitled to relief under § 1983 for defendants' alleged violations of certain Spending Clause legislation, the defendants would not be required "to provide money to [the] plaintiffs."

V

If the relief unavailable under Title VII and ordered under Title VI is the kind of relief that should be withheld in enforcing a Spending Clause statute, the Court should affirm the judgment of the Court of Appeals without more. Only if all or some of this relief is the kind of declaratory or prospective relief that private enforcement of Title VI properly contemplates should the Court of Appeals be reversed in whole or in part. To resolve this matter, I now consider the items of relief ordered by the District Court to determine if any element is a permissible injunctive remedy.

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[24] JUSTICE MARSHALL erroneously contends, *post*, at 632, that my view "would allow recipients to violate the conditions of their contracts until a court identifies the violation and either enjoins its continuance or orders the recipient to begin performing its duties incident to the receipt of federal money." This is not so, because the Federal Government can always sue any recipient who fails to comply with the terms of the grant agreement and force the violator to repay misspent funds. See *Bell* v. *New Jersey*, 461 U. S. 773, 794 (1983) (WHITE, J., concurring). But it is an entirely different matter to subject the recipient to open-ended liability to private plaintiffs. JUSTICE MARSHALL's third-party beneficiary analogy, *post*, at 632–633, is appealing, but he ignores the possibility that Congress may have felt that the salutary deterrent effect of a compensatory remedy was outweighed by the possibility that such a remedy would dissuade potential recipients from participating in important federal programs. Of course, not every contract that benefits third persons accords enforceable rights in such persons; it is a question of intent. See 4 A. Corbin, Contracts § 777 (1951). Section 313 of the Restatement (Second) of Contracts (1981) states that a party who contracts with a government agency to do an act or render a service to the public is generally *not* subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform. The only exceptions to this rule involve situations where the terms of the contract provide for such liability, or where the governmental entity would be subject to liability to the injured member of the public. *Ibid.* Neither of these exceptions is applicable in the present context.

Although the Eleventh Amendment cases are not dispositive here, in holding that only prospective relief is available to remedy violations of federal law by state officials, the Court in *Edelman* v. *Jordan*, 415 U. S. 651, 667 (1974), observed that the difference between permissible and impermissible relief "will not in many instances be that between day and night." It seems as patent here as in the Eleventh Amendment context that the relief cannot include a monetary award for past wrongs, even if the award is in the form of "equitable restitution" instead of damages. See *id.*, at 665–667. However, prospective relief need not be "totally without effect on the [defendant's] revenues"; injunctive relief is permissible even if it means that the defendants, in order to shape their conduct to the mandate of the court's decree, will have to spend more money "than if they had been left free to pursue their previous course of conduct." *Id.*, at 667–668. The key question for present purposes is whether the decree requires the payment of funds or grants other relief, "not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation" or other relief based on or flowing from violations at a prior time when the defendant "was under no court-imposed obligation to conform to a different standard." *Id.*, at 668.

The District Court in the present case granted a number of relatively discrete items of relief. First, each class member was awarded constructive seniority, which included the right to: (1) "all monetary entitlements which [the class members] would have received had they been appointed on their constructive seniority date," including backpay and back medical and insurance benefits; and (2) all other entitlements relative to the award of constructive seniority, including salary, benefits, and pension rights. Also, respondents were directed to give a sergeant's examination to those class members whose constructive seniority would have entitled them to take the last such examination. Finally, in an effort to insure that future hiring practices would be nondiscriminatory, respondents were ordered to consult with petitioners on the preparation and use of future police officer examinations for the next two years, and to provide petitioners with race and ethnicity information regarding the scores of the next scheduled examination. App. A99–A107.[25]

On the one hand, it is obvious that the award of backpay and back benefits constitutes relief based upon past conduct no longer permissible; it therefore should not stand. On the other hand, it is without doubt that the portion of the order requiring consultation to insure that future examinations will not have discriminatory effects constitutes permissible injunctive relief aimed at conforming respondents' future conduct to the declared law.

This leaves the award of constructive seniority for purposes of future entitlements: the right to take the special sergeant's examination ordered by the District Court and the right to an increase of salary and benefits to the level warranted by the constructive seniority. Because such an award affects only the future conduct of a defendant, it arguably could be categorized as permissible prospective relief. I conclude, however, that an award of constructive seniority, for any purpose whatsoever, must be deemed impermissible retroactive relief.

In *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 766–767 (1976), we identified two types of seniority—"benefit" and "competitive status." The first of these, "which determines pension rights, length of vacations, size of insurance coverage and unemployment benefits, and the like, is analogous to backpay. . . . Benefit-type seniority, like backpay, serves to work complete equity by penalizing the wrongdoer economically at the same time that it tends to make whole the one who was wronged." *Id.*, at 786–787 (POWELL, J.). A general bar to the award of retroactive seniority "reduces the restitution required of an employer at such time as he is called upon to account for his discriminatory actions perpetrated in violation of the law." *Id.*, at 767, n. 27 (opinion of the Court). Since constructive benefit-type seniority in this case is obviously restitutionary and remedial in nature, it is "a form of compensation" to those whose rights were violated at a time when the respondents were "under no court-imposed obligation to conform to a different standard." *Edelman* v. *Jordan*, 415 U. S., at 668. It is therefore not an appropriate remedy for the Title VI violations alleged here.

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[25] As permitted by 42 U. S. C. § 2000e–5(k) and 42 U. S. C. § 1988, the District Court also awarded attorney's fees to petitioners. App. A107.

An award of "competitive status" seniority, although prospective in form, nevertheless constitutes a form of compensation or relief based on past conduct now deemed violative of the Act. In no respect can such an award be said to be "a necessary consequence," *ibid.*, of future Title VI compliance by the employer. It therefore must also be considered an inappropriate Title VI remedy. I also note that competitive-type seniority "determines an employee's preferential rights to various economic advantages at the expense of other employees. These normally include the order of layoff and recall of employees, job and trip assignments, and consideration for promotion." *Franks*, *supra*, at 787 (POWELL, J.). Although an award of constructive seniority of this nature does not result in any increased costs to the wrongdoing employer, it "directly implicate[s] the rights and expectations of perfectly innocent employees," 424 U. S., at 788, and it can only be viewed as compensation for a past wrong. Accordingly, I conclude that neither "benefit" nor "competitive status" constructive seniority may be obtained as a private remedy for Title VI violations, at least in the absence of proof of intentional discrimination.

In view of the foregoing, it is apparent to me that the only proper Title VI relief granted by the District Court is the order directing the respondents to take actions and make disclosures intended to insure that future hiring practices will be nondiscriminatory and valid. However, this relief is wholly sustainable under the District Court's findings and conclusions with respect to petitioners' Title VII claim, and all members of the class will fully benefit from it.[26] There is thus no need to disturb the judgment of the Court of Appeals.

VI

In conclusion, for the reasons expressed above, I am convinced that discriminatory intent is not an essential element of a Title VI violation, but that a private plaintiff should recover only injunctive, noncompensatory relief for a defendant's unintentional violations of Title VI. Such relief should not include an award of constructive seniority. Albeit on different grounds, the judgment below is

Affirmed.[27]

JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, and with whom JUSTICE REHNQUIST joins as to Part II, concurring in the judgment.

With reluctance, I write separately. The many opinions filed in this case draw lines that are not required by, and indeed in some instances seem incompatible with, our prior decisions. Our opinions today will further confuse rather than guide.[1]

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[26] Under Title VII, this type of relief can be granted unconditionally. Under Title VI, the defendants should be given the option of complying or terminating participation in the federal program. See Parts IV and V, *supra*.

[27] Despite the numerous opinions, the views of at least five Justices on two issues are identifiable. The dissenters, JUSTICES BRENNAN, MARSHALL, BLACKMUN, and STEVENS, join with me to form a majority for upholding the validity of the regulations incorporating a disparate-impact standard. See n. 2, *supra*. A different majority, however, would not allow compensatory relief in the absence of proof of discriminatory intent. JUSTICE REHNQUIST and I reach this conclusion directly. See Parts III and IV, *supra*; *post*, at 612 (REHNQUIST, J., concurring in judgment). JUSTICE POWELL, joined by THE CHIEF JUSTICE, *post*, at 608–610, believes that no private relief should ever be granted under Title VI under any circumstances. JUSTICE O'CONNOR, *post*, at 615, would hold that all relief should be denied unless discriminatory intent is proved. It follows from the views of these three latter Justices that no compensatory relief should be awarded if discriminatory animus is not shown.

I

In *Cannon* v. *University of Chicago*, 441 U. S. 677, 730 (1979) (POWELL, J., dissenting), I would have held that Congress intended no implied private right of action under Title IX of the Education Amendments of 1972. For the same general reasons, I also would hold that petitioners may not maintain this action under Title VI of the Civil Rights Act of 1964.

Congress, for reasons of its own, all too frequently elects to remain silent on the private right-of-action question. The result frequently is uncertainty and litigation as to available remedies, leaving the courts to provide an answer without clear legislative guidance. We have recognized repeatedly that whether a private right of action may be implied requires a determination of congressional intent. See, *e. g.*, *Jackson Transit Authority* v. *Transit Union*, 457 U. S. 15, 20–23 (1982); *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 568 (1979). We look, of course, to the legislative history, and in particular to what other remedies have been provided. See *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 19 (1979) ("it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it").

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[1] In particular, the Court is divided as to the standard of proof required to prove violations of rights in cases involving Title VI. Seven Members of the Court agree that a violation of the statute itself requires proof of discriminatory intent. See *infra*, at 610–611; *post*, at 612 (REHNQUIST, J., concurring in judgment); *post*, at 612, and n. 1 (O'CONNOR, J., concurring in judgment); *post*, at 641–642 (STEVENS, J., dissenting, joined by BRENNAN and BLACKMUN, JJ.) ("Today, proof of invidious purpose is a necessary component of a valid Title VI claim"). Only JUSTICES WHITE and MARSHALL believe that a violation of Title VI may be established by proof of discriminatory effect, and JUSTICE WHITE would recognize only noncompensatory, prospective relief for such a violation. See *ante*, at 602–604. JUSTICES BRENNAN, BLACKMUN, and STEVENS, however, believe that a violation of the *regulations* adopted pursuant to Title VI may be established by proof of discriminatory impact. See *post*, at 645 (STEVENS, J., dissenting).

Thus, a majority of the Court would hold that proof of discriminatory effect suffices to establish liability only when the suit is brought to enforce the regulations rather than the statute itself. And it would seem that the regulations may be enforced only in a suit pursuant to 42 U. S. C. § 1983; anyone invoking the implied right of action under Title VI would be limited by the discriminatory-intent standard required to prove violations of Title VI. Thus, the apparent result is that a suit against *governmental* recipients of federal funds—who may be sued under § 1983—will be governed by a different standard of liability than a suit against *private* recipients of federal funds. *One would have difficulty explaining this result in terms of the* legislative history of Title VI.

The legislative history of Title VI is replete with references to the Act's central purpose of ensuring that taxpayers' money be spent nondiscriminatorily. See *ante*, at 599 (opinion of WHITE, J.). In accord with this purpose, Congress expressly provided for perhaps the most effective of all remedies in a federal funding statute: the cutting off of funds.[2] In addition, it created a carefully constructed administrative procedure to ensure that such withholding of funds is ordered only where appropriate. In light of these factors, I do not believe that Congress intended to authorize private suits but failed to do so through some inadvertence. See also *University of California Regents* v. *Bakke*, 438 U. S. 265, 381 (1978) (opinion of WHITE, J.) ("[T]here is no express provision for private actions to enforce Title VI, and it would be quite incredible if Congress, after so carefully attending to the matter of private actions in other Titles of the Act, intended silently to create a private cause of action to enforce Title VI").[3] I would affirm the judgment below solely on this issue.

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[2] JUSTICE MARSHALL argues that private relief must be available because the statutory remedy of a fund cutoff is "impractical" and "too Draconian to be widely used." *Post*, at 626–627 (dissenting opinion). See *post*, at 638, n. 7 (STEVENS, J., dissenting). In my view, such reasoning evinces a departure from the principle that legislative intent is the guide to implying a right of action. The judiciary is not free to decide that remedies affirmatively and expressly adopted by Congress are so "impractical" or "Draconian" that judicially created remedies are necessary. See *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 578 (1979) ("The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law"). Rather, Congress' express adoption of one remedy—and one only—should be viewed as a congressional choice that should be obeyed. See *Cannon* v. *University of Chicago*, 441 U. S. 677, 749 (1979) (POWELL, J., dissenting) ("Where a statutory scheme expressly provides for an alternative mechanism for enforcing the rights and duties created, I would be especially reluctant ever to permit a federal court to volunteer its services for enforcement purposes").

II

There is, however, an alternative ground for affirmance. Both the District Court and the Court of Appeals agreed that petitioners had failed to show any intentional discrimination. The Court of Appeals, relying on the opinions in *Bakke*, held that such a showing—one that must be made to establish an equal protection claim—is a prerequisite to a successful Title VI claim. I agree with JUSTICE STEVENS, *post*, at 639–642, that the Court of Appeals was correct in its reading of our opinions in *Bakke*.

My conclusion in *Bakke* was that "[i]n view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." 438 U. S., at 287. JUS-

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[3] I also would hold that private actions asserting violations of Title VI may not be brought under 42 U. S. C. § 1983. Congress' creation of an express administrative procedure for remedying violations strongly suggests that it did not intend that Title VI rights be enforced privately either under the statute itself or under § 1983. See *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 20–21 (1981); cf. *Maine* v. *Thiboutot*, 448 U. S. 1, 22, n. 11 (1980) (POWELL, J., dissenting) (an exception to § 1983 liability is "where the governing statute provides an exclusive remedy for violations of its terms").

TICES BRENNAN, WHITE, MARSHALL, and BLACKMUN undertook a thorough analysis of the legislative history in reaching the same conclusion. See *id.*, at 328–340. They concluded "that Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's." *Id.*, at 352. This construction necessarily requires rejection of the prior decision in *Lau* v. *Nichols*, 414 U. S. 563 (1974), that discriminatory impact suffices to establish liability under Title VI.[4] In my view, the Court of Appeals therefore was fully justified in holding that petitioners failed to establish their Title VI claims.[5]

For these reasons, I concur in the Court's judgment.

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[4] The *Lau* Court did not undertake any analysis of the legislative history of Title VI, reaching its conclusion essentially without supporting reasoning. I have no occasion here to consider whether the result in *Lau* may stand despite rejection of its assumed premise.

[5] For the reasons stated by JUSTICE O'CONNOR, *post*, at 612–615, I reject JUSTICE STEVENS' novel argument that an administrative agency is free to adopt any regulation that may be said to further the purposes of an enabling statute. Administrative agencies do not have—and should not have—such lawmaking power.

JUSTICES WHITE and MARSHALL would avoid the explicit reasoning of *Bakke* by deferring to a prior administrative construction of Title VI. See *ante*, at 592–593 (opinion of WHITE, J.); *post*, at 617–623 (MARSHALL, J., dissenting). I do not question the view that the Court should "sustai[n] a reasonable administrative interpretation even if we would have reached a different result had the question initially arisen in a judicial proceeding." *Post*, at 621 (MARSHALL, J., dissenting). But I know of no precedent whatever for asserting that this deference to administrative interpretation is proper *after* this Court already has issued a definitive—and contrary—construction of its own. Moreover, in *Bakke* JUSTICES WHITE and MARSHALL agreed that "[n]owhere is there any suggestion that Title VI was intended to terminate federal funding for any reason other than consideration of race or national origin by the recipient institution in a manner inconsistent with the standards incorporated in the Constitution." 438 U. S., at 332 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). If "nowhere" is there any evidence that Congress intended the Title VI standard to differ from the constitutional standard, clearly an agency interpretation to the contrary is entitled to no deference.

JUSTICE REHNQUIST, concurring in the judgment.

I join in Parts I, III, IV, and V of JUSTICE WHITE's opinion and join in Part II of JUSTICE POWELL's opinion. I therefore would affirm the judgment of the Court of Appeals.

JUSTICE O'CONNOR, concurring in the judgment.

For reasons given in Part I of the dissent by JUSTICE STEVENS, *post*, at 636–639, I cannot agree with the limitations that JUSTICE WHITE's opinion would place on the scope of equitable relief available to private litigants suing under Title VI.[1] Therefore, like the dissent, I would address two further questions: (1) whether proof of purposeful discrimination is a necessary element of a valid Title VI claim, and (2) if so, whether administrative regulations incorporating an impact standard may be upheld as within the agency's statutory authority. My affirmative answer to the first question leads me to conclude that regulations imposing an impact standard are not valid. On that basis, I would affirm the judgment below.

Were we construing Title VI without the benefit of any prior interpretation from this Court, one might well conclude that the statute was designed to redress more than purposeful discrimination. Cf. *University of California Regents* v. *Bakke*, 438 U. S. 265, 412–418 (1978) (opinion of STEVENS, J.). In *Bakke*, however, a majority of the Court concluded otherwise. *Id.*, at 287 (opinion of POWELL, J.); *id.*, at 328 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). Like JUSTICE STEVENS, *post*, at 641–642, I feel constrained by *stare decisis* to follow that interpretation of the statute. I part company with JUSTICE STEVENS' dissent, however, when it concludes that administrative regulations incorporating an "effects" standard may be upheld notwithstanding the statute's proscription of intentional discrimination only. See *post*, at 642–645. Administrative regulations having the force of law may be set aside only if they exceed the statutory authority of the agency or are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Batterton* v. *Francis*, 432 U. S. 416, 426 (1977). JUSTICE STEVENS' dissent argues that agency regulations incorporating an "effects" standard reflect a reasonable method of "further[ing] the purposes of Title VI." *Post*, at 644. If, as five Members of the Court concluded in *Bakke*, the purpose of Title VI is to proscribe *only* purposeful discrimination in a program receiving federal financial assistance, it is difficult to fathom how the Court could uphold administrative regulations that would proscribe conduct by the recipient having only a discriminatory *effect*. Such regulations do not simply "further" the purpose of Title VI; they go well *beyond* that purpose.

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[1] Because I conclude that the decision below should be affirmed on the ground that petitioners have failed to prove intentional discrimination, I have no occasion to address the question whether there is a private cause of action under Title VI for damages relief.

The Court's decision in *City of Rome* v. *United States*, 446 U. S. 156 (1980), does not persuade me to the contrary. The challenge there was to the constitutionality of a federal statute that imposed a stricter standard of nondiscrimination than that required by the constitutional provision pursuant to which the statute was enacted. Specifically, the Court held that, under the enabling authority in § 2 of the Fifteenth Amendment, Congress may enact a statute banning voting practices having a discriminatory effect, even if § 1 of the Amendment prohibits only intentional discrimination in voting. *Id.*, at 178. The Court reasoned that Congress' power under § 2 of the Amendment is "no less broad than its authority under the Necessary and Proper Clause." *Id.*, at 175. Therefore, as long as the statute was an appropriate means of enforcing the Fifteenth Amendment's prohibition, the statute was valid.

The breadth of authority granted to Congress under the enabling provision of the Fifteenth Amendment is not equivalent to the amount of discretion that an administrative agency possesses in implementing the provisions of a federal statute.[2] An administrative agency is itself a creature of statute. Although the Court has stated that an agency's legislative regulations will be upheld if they are "reasonably related" to the purposes of the enabling statute, *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356, 369 (1973), we would expand considerably the discretion and power of agencies were we to interpret "reasonably related" to permit agencies to proscribe conduct that Congress did not intend to prohibit. "Reasonably related to" simply cannot mean "inconsistent with." Yet that would be the effect of upholding the administrative regulations at issue in this case if, as five Justices concluded in *Bakke*, the expressed will of Congress is that federal funds recipients are prohibited only from purposefully discriminating on the grounds of race, color, or national origin in the administration of funded programs.

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[2] JUSTICE STEVENS relies upon a 1900 decision by this Court for the proposition that "an administrative regulation's conformity to statutory authority [is] to be measured by the same standard as a statute's conformity to constitutional authority." *Post*, at 644 (citing *Boske* v. *Comingore*, 177 U. S. 459, 470). *Boske*, however, is distinguishable in that the statutory authority for the regulation at issue there conferred the general administrative power to adopt rules to carry out the functions of the office. 177 U. S., at 467. With respect to this same statute, the Court observed in a subsequent case that it conferred "administrative power only. . . . [C]ertainly under the guise of regulation legislation cannot be exercised." *United States* v. *George*, 228 U. S. 14, 20 (1913). In *George* the Court disapproved a regulation by the Interior Department which had the effect of enlarging the statute, emphasizing the fundamental "distinction between the legislative and administrative function." *Id.*, at 22.

Moreover, cases since *Boske* articulating the limitations applicable to agency rulemaking power indicate that the scope of agency discretion is indeed narrower than the language of *Boske* would suggest. For example, in *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185 (1976), the Court declined to endorse an interpretation of Securities and Exchange Commission Rule 10b–5, 17 CFR § 240.10b–5 (1975), as proscribing mere negligent conduct. The Court observed:

"More importantly, Rule 10b–5 was adopted pursuant to authority granted the Commission under § 10(b). The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is '"the power to adopt regulations to carry into effect the will of Congress as expressed by the statute."' *Dixon* v. *United States*, 381 U. S. 68, 74 (1965), quoting *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129, 134 (1936). Thus, . . . [the Rule] cannot exceed the power granted the Commission by Congress under § 10(b)." 425 U. S., at 212–214.

See also *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S., 129, 134 (1936) ("A regulation which does not [carry into effect the will of Congress as expressed by the statute], but operates to create a rule out of harmony with the statute, is a mere nullity"). Cf. *FCC* v. *American Broadcasting Co.*, 347 U. S. 284, 296 (1954) (agency cannot make illegal by regulation what is legal under the statute).

I acknowledge that in *Lau* v. *Nichols*, 414 U. S. 563 (1974), the Court approved liability under Title VI for conduct having only a discriminatory impact. Nevertheless, I believe that JUSTICES BRENNAN, WHITE, MARSHALL, and BLACKMUN accurately observed in *Bakke*, 438 U. S., at 352, that *Bakke*'s interpretation of "Title VI's definition of racial discrimination [to be] absolutely coextensive with the Constitution's" casts serious doubt on the correctness of the *Lau* decision. In my view, the logical implications of that interpretation require that *Lau* be overruled. Accordingly, I would conclude that the Title VI regulations at issue here cannot validly serve as the basis for liability. Because petitioners have failed to prove intentional discrimination, I would affirm the judgment of the Court of Appeals.

JUSTICE MARSHALL, dissenting.

We granted certiorari in this case to consider whether proof of discriminatory intent is required to establish a violation of Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.* For the reasons outlined below, I agree with JUSTICE WHITE that proof of discriminatory animus should not be required. Unlike JUSTICE WHITE, however, I believe that compensatory relief may be awarded to private Title VI plaintiffs in the absence of proof of discriminatory animus. I would therefore reverse the judgment of the Court of Appeals.

I

The question presented by the petition for certiorari is whether a Title VI plaintiff can obtain relief upon proof that a non-job-related employment requirement has a discriminatory effect on minority applicants, or must also prove discriminatory intent. Pet. for Cert. i. This issue has divided the Courts of Appeals.[1] To resolve it we must decide whether our decision in *Lau* v. *Nichols*, 414 U. S. 563 (1974), which held that proof of discriminatory impact is sufficient to establish a violation of Title VI, must be overruled in light of the views subsequently expressed by five Justices in *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978).

In *Lau* v. *Nichols*, this Court held that the San Francisco school system had violated Title VI by failing to provide supplemental language instruction to children of Chinese ancestry who did not speak English. The plaintiffs in *Lau* did not show that the officials in charge of the school system had intended to discriminate against students of Chinese ancestry. See *Fullilove* v. *Klutznick*, 448 U. S. 448, 479 (1980) (opinion of BURGER, C. J., joined by WHITE and POWELL, JJ.). Because the failure to provide supplemental instruction had a discriminatory impact, this Court nevertheless concluded that the school system had violated Title VI. Looking to departmental regulations for guidance, the Court emphasized that Title VI bars programs that have a discriminatory "*effect* even though no purposeful design is present." 414 U. S., at 568 (emphasis in original).

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[1] Compare *Castaneda* v. *Pickard*, 648 F. 2d 989, 1000 (CA5 1981) (intent standard); *Cannon* v. *University of Chicago*, 648 F. 2d 1104, 1108 (CA7 1981) (same); *Lora* v. *Board of Education*, 623 F. 2d 248, 250 (CA2 1980) (same), with *NAACP* v. *Medical Center, Inc.*, 657 F. 2d 1322, 1328 (CA3 1981) (en banc) (impact standard); *Board of Education of City School Dist.* v. *Califano*, 584 F. 2d 576, 589 (CA2 1978) (same), aff'd on other grounds *sub nom. Board of Education, New York City* v. *Harris*, 444 U. S. 130 (1979); *Guadalupe Organization, Inc.* v. *Tempe Elementary School Dist. No. 3*, 587 F. 2d 1022, 1029, and n. 6 (CA9 1978) (same).

In *University of California Regents* v. *Bakke, supra,* five Justices concluded that Title VI does not prohibit a recipient of federal aid from taking race into account in an affirmative-action program designed to eradicate the vestiges of past discrimination. Since the special admissions program challenged in *Bakke* deliberately used racial criteria, that case did not require consideration of whether proof of discriminatory intent is necessary to establish a violation of Title VI. The only question posed was whether a conceded resort to race was permissible as a means of eliminating the effects of past discrimination. However, in reaching the conclusion that the consideration of race in an affirmative-action program does not violate Title VI, we relied in part on our view that Title VI's proscription of racial discrimination is coextensive with that of the Equal Protection Clause. 438 U. S., at 287 (opinion of POWELL, J.); *id.*, at 328 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). Because the Equal Protection Clause has been held to prohibit only intentional discrimination, *Washington* v. *Davis*, 426 U. S. 229, 238–248 (1976), the view we expressed in *Bakke* calls into question the holding in *Lau* v. *Nichols* that proof of discriminatory impact is sufficient to establish a violation of Title VI.[2]

If we were required to decide the issue presented by this case in the absence of a persuasive administrative interpretation of the statute, I would hold, in accordance with the view expressed in *Bakke*, that Title VI requires proof of discriminatory intent, even though this holding would entail overruling *Lau* v. *Nichols*. But the case comes to us against the background of administrative regulations that have uniformly and consistently interpreted the statute to prohibit programs that have a discriminatory impact and that cannot be justified on nondiscriminatory grounds. As Justice Frankfurter once observed, the doctrine of *stare decisis* is not "an imprisonment of reason." *United States* v. *International Boxing Club of New York, Inc.*, 348 U. S. 236, 249 (1955) (dissenting opinion). The broad view expressed in *Bakke*, which was not necessary to the decision in that case, does not foreclose consideration of whether this longstanding administrative interpretation of the statute is a reasonable one which should be followed by this Court.

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[2] We have not resolved the inconsistency between the two decisions in any of our subsequent cases. See, *e. g.*, *Board of Education, New York City* v. *Harris, supra,* at 149 ("There thus is no need here for the Court to be concerned with the issue whether Title VI of the Civil Rights Act of 1964 incorporates the constitutional standard").

Shortly after the enactment of Title VI, a Presidential task force produced model Title VI enforcement regulations specifying that recipients of federal funds not use "criteria or methods of administration which have the *effect* of subjecting individuals to discrimination." 45 CFR § 80.3(b)(2) (1964) (emphasis added).[3] The Justice Department, which had helped draft the language of Title VI,[4] participated heavily in preparing the regulations.[5] Seven federal agencies and departments carrying out the mandate of Title VI soon promulgated regulations that applied a disparate-impact or "effects" test. See 29 Fed. Reg. 16274–16305 (1964). As a contemporaneous construction of a statute by those charged with setting the law in motion, these regulations deserve substantial respect in determining the meaning of Title VI. *Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 450 (1978); *Power Reactor Development Co.* v. *Electricians*, 367 U. S. 396, 408 (1961); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315 (1933). See also *Zuber* v. *Allen*, 396 U. S. 168, 192 (1969) (interpretation of a statute by administrators who participated in drafting it carries "most weight"). When an administrative agency has exercised its judgment with respect to an issue that is not clearly resolved by the language and purposes of the statute it is statutorily mandated to enforce, this Court will accord due consideration to the views of the agency. Indeed, in *Bakke* itself, the opinion of four Justices which I coauthored stressed that agency regulations authorizing and in some cases requiring affirmative-action programs[6] were "entitled to considerable deference in construing Title VI." 438 U. S., at 342 (BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.).

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[3] See Comment, 36 Geo. Wash. L. Rev. 824, 845–846 (1968).

[4] Civil Rights: Hearings before Subcommittee No. 5 of the House Committee on the Judiciary, 88th Cong., 1st Sess., 2703 (1963) (testimony of Attorney General Kennedy).

[5] See Comment, 36 Geo. Wash. L. Rev., at 845–846.

Following the initial promulgation of regulations adopting an impact standard, every Cabinet Department and about 40 federal agencies adopted standards interpreting Title VI to bar programs with a discriminatory impact.[7] The statute has been uniformly and consistently so construed by the agencies responsible for its enforcement for nearly two decades. Our cases make clear that a longstanding and consistent administrative interpretation of a statute is entitled to special weight. *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 274–275 (1974); *Trafficante* v. *Metropolitan Life Insurance*

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[6] See, *e. g.*, 34 CFR § 100.3(b)(6) (1982) (Dept. of Education); 24 CFR § 1.4(b)(6) (1982) (Dept. of Housing and Urban Development); 45 CFR § 80.3(b)(6) (1982) (Dept. of Health and Human Services); 28 CFR § 42.104(b)(6) (1982) (Dept. of Justice); 29 CFR § 31.3(b)(6) (1982) (Dept. of Labor). However, these regulations were not prepared contemporaneously with enactment of Title VI and, for that reason alone, are less weighty than the "impact" regulations.

[7] Regulations of the Cabinet Departments are as follows. Dept. of Agriculture, 7 CFR § 15.3(b)(2) (1982); Dept. of Commerce, 15 CFR § 8.4(b)(2) (1982); Dept. of Defense, 32 CFR § 300.4(b)(2) (1982); Dept. of Education, 34 CFR § 100.3(b)(2) (1982); Dept. of Energy, 10 CFR §§ 1040.13(c), (d) (1982); Dept. of Health and Human Services, 45 CFR §§ 80.3(b)(2), (3) (1982); Dept. of Housing and Urban Development, 24 CFR §§ 1.4(2)(i), (3) (1982); Dept. of the Interior, 43 CFR §§ 17.3(b)(2), (3) (1982); Dept. of Justice, 28 CFR §§ 42.104(b)(2), (3) (1982); Dept. of Labor, 29 CFR §§ 31.3(b)(2), (3) (1982); Dept. of State, 22 CFR § 141.3(b)(2) (1982); Dept. of Transportation, 49 CFR §§ 21.5(b)(2), (3) (1982); Dept. of Treasury, 31 CFR § 51.52(b)(4) (1982). For a listing of the federal agencies with such standards, see CFR Index (1982).

Co., 409 U. S. 205, 210 (1972); *United States* v. *Bergh*, 352 U. S. 40, 46–47 (1956).

It is also significant that this administrative interpretation of Title VI has never been altered by Congress, despite its awareness of the interpretation. In 1966, the House of Representatives defeated a proposal to alter Title VI to prohibit only intentional discrimination, and the proposal never emerged from committee in the Senate.[8] In the Elementary and Secondary Education Amendments of 1969, Congress directed that guidelines and criteria established under Title VI dealing with *de jure* and *de facto* school segregation be applied uniformly across the country regardless of the origin or cause of such segregation. Pub. L. 91–230, § 2, 84 Stat. 121, 42 U. S. C. § 2000d–6. Since the passage of the 1964 Act, Congress has also enacted 10 additional statutes modeled on § 601 of Title VI, none of which define discrimination to require proof of intent.[9] Although caution must be exercised when dealing with congressional inaction, we have recognized that it is appropriate to attribute significance to such inaction where an administrative interpretation "involves issues of considerable public controversy," *United States* v. *Rutherford*, 442 U. S. 544, 554 (1979), and Congress has not acted to correct any misinterpretation of its objectives despite its continuing concern with the subject matter, *ibid.*

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[8] See 112 Cong. Rec. 18715 (1966) (House vote). The identical amendment was introduced by Senator Ervin and Representative Whitener, both strong critics of the 1964 Act. The amendment would have conditioned fund termination on a constitutional violation and would have defined "discrimination" under Title VI to require a showing of "affirmative intent to exclude." *Id.*, at 10062, 18701. Both sponsors stated that one purpose of their proposals was "to negate the application of purely mechanistic and statistical criteria in the determination of discrimination." *Id.*, at 10061 (Sen. Ervin); *id.*, at 18701 (Rep. Whitener). Proponents of the measure criticized the administrative guidelines that had been issued under the 1964 Act. *E. g., id.*, at 18703 (Rep. Landrum). Opponents of the measure asserted that it would constitute "a complete repealer of title VI," *ibid.* (Rep. Rodino), and that it "would gut title VI of the 1964 law." *Id.*, at 18705 (Rep. Kastenmeier).

[9] See 20 U. S. C. § 1681(a) (Title IX of the Education Amendments of 1972); 29 U. S. C. § 794 (Rehabilitation Act of 1973); 31 U. S. C. § 1242 (Revenue Sharing Act); 42 U. S. C. § 3766(c)(1) (Crime Control Act of 1973); 42 U. S. C. § 5309 (Housing and Community Development Act of 1976); 42 U. S. C. § 5672(b) (Juvenile Justice Act of 1974); 42 U. S. C. § 6102 (Age Discrimination Act); 42 U. S. C. § 6709 (Public Works Employment Act); 42 U. S. C. § 6870(a) (Energy Conservation and Resources Renewal Act of 1976); 45 U. S. C. § 803 (Railroad Revitalization and Regulatory Reform Act). Congress directed its attention to the Title VI

A contemporaneous and consistent construction of a statute by those charged with its enforcement combined with congressional acquiescence "creates a presumption in favor of the administrative interpretation, to which we should give great weight, *even if we doubted the correctness of the ruling of the Department* . . . ." *Costanzo* v. *Tillinghast*, 287 U. S. 341, 345 (1932) (emphasis added). Thus, in construing statutes, this Court has repeatedly sustained a reasonable administrative interpretation even if we would have reached a different result had the question initially arisen in a judicial proceeding. *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U. S. 27, 39 (1981); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 381 (1969); *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965); *Unemployment Compensation Comm'n* v. *Aragon*, 329 U. S. 143, 153 (1946); *United States* v. *Alexander*, 12 Wall. 177, 179–181 (1871).

While not the only reasonable construction of the statute, the uniform administrative construction of Title VI is "far from unreasonable." *Zenith Radio Corp.* v. *United States*, 437 U. S., at 451. The Civil Rights Act was aimed at "eradicating significant areas of discrimination on a nationwide basis." H. R. Rep. No. 914, 88th Cong., 1st Sess., 18 (1963). The "[m]ost glaring" problem was "the discrimination against Negroes which exists throughout our Nation." *Ibid.* Given that Title VI was meant to remedy past dis-

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regulations in enacting the Public Works Employment Act of 1976, which provides for enforcement "through agency provisions and rules similar to those already established, with respect to racial and other discrimination under title VI of the Civil Rights Act of 1964." 42 U. S. C. § 6709.

crimination against minorities, 438 U. S., at 285 (POWELL, J.); *id.*, at 328 (BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.), an "effects" test is a reasonable means of effectuating this goal. See *City of Rome* v. *United States*, 446 U. S. 156, 177 (1980) (ban on electoral changes having a discriminatory impact is an appropriate method of enforcing prohibition against intentional discrimination). In addition, when the agencies first interpreted the statute in 1964, 12 years before *Washington* v. *Davis*, 426 U. S. 229 (1976), the equal protection standard could easily have been viewed as one of discriminatory impact. See, *e. g.*, *Arnold* v. *North Carolina*, 376 U. S. 773 (1964) *(per curiam)*; *Anderson* v. *Martin*, 375 U. S. 399 (1964).[10] Moreover, given the need for an objective and administrable standard applicable to thousands of federal grants under Title VI, the "effects" test is far more practical than a test that focuses on the motive of the recipient, which is typically very difficult to determine.[11]

The legislative history of Title VI fully confirms that Congress intended to delegate to the Executive Branch substantial leeway in interpreting the meaning of discrimination under Title VI. See Abernathy, Title VI and the Constitution: A Regulatory Model for Defining "Discrimination," 70 Geo. L. J. 1, 20–39 (1981). The word "discrimination" was nowhere defined in Title VI.[12] Instead, Congress authorized executive departments and agencies to adopt regulations with the antidiscrimination principle of § 601 of the Act "as a general criterion to follow." Civil Rights: Hearings on H. R. 7152 before the House Committee on the Judiciary, 88th Cong., 1st Sess., 2740 (1963) (testimony of Attorney General Kennedy). Congress willingly conceded "[g]reat powers" to the Executive Branch in defining the reach of the statute. *Id.*, at 1520 (statement of Rep. Celler, Chairman of the House Judiciary Committee).[13] Indeed, the significance of the administrative role in the statutory scheme is underscored by the fact that Congress required the President to approve all Title VI regulations.[14]

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[10] See also *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960); Perry, The Disproportionate Impact Theory of Racial Discrimination, 125 U. Pa. L. Rev. 540, 544 (1977) ("Considerable uncertainty existed prior to *Washington* in regard to whether the principal element of a constitutional claim of racial discrimination was discriminatory purpose or simply discriminatory effect"). Of course, even in *Washington* v. *Davis* the Court made clear that evidence of discriminatory impact may be highly probative of discriminatory intent, 426 U. S., at 242.

[11] See *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights*, 558 F. 2d 1283, 1290 (CA7 1977) (discussing Title VIII), cert. denied, 434 U. S. 1025 (1978).

[12] See 110 Cong. Rec. 5612 (1964) (Sen. Ervin); *id.*, at 1619 (Rep. Abernethy); *id.*, at 1632 (Rep. Dowdy); *id.*, at 5251 (Sen. Talmadge); *id.*, at 6052 (Sen. Johnston).

In the face of a reasonable and contemporaneous administrative construction that has been consistently adhered to for nearly 20 years, originally permitted and subsequently acquiesced in by Congress, and expressly adopted by this Court in *Lau*, I would hold that Title VI bars practices that have a discriminatory impact and cannot be justified on legitimate grounds.[15] I frankly concede that our reasoning in *Bakke* was broader than it should have been. The statement that Title VI was "absolutely coextensive" with the Equal Protection Clause, 438 U. S., at 352, was clearly superfluous to the decision in that case. Whatever the precise relationship between Title VI and the Equal Protection Clause may be, it would have been perverse to construe a statute designed to ameliorate the plight of the victims of racial discrimination to prohibit recipients of federal funds from voluntarily employing race-conscious measures to eliminate the effects of past societal discrimination. *Id.*, at 336–350, 353–355 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.).[16]

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[13] See Civil Rights—the President's Program, 1963: Hearings before the Senate Committee on the Judiciary, 88th Cong., 1st Sess., 400 (1963) (colloquy between Sen. Ervin and Attorney General Kennedy); Civil Rights: Hearings on H. R. 7152 before the House Committee on the Judiciary, 88th Cong., 1st Sess., 2765–2766 (1963) (colloquy between Rep. Mathias and Attorney General Kennedy); *id.*, at 1890 (remarks of Rep. Celler); 110 Cong. Rec. 2498 (1964) (remarks of Rep. Selden); *id.*, at 12320 (remarks of Sen. Byrd).

[14] 42 U. S. C. § 2000d-1. See 110 Cong. Rec. 2499 (1964) (quoting amendment of Rep. Lindsay).

[15] Proof of the disproportionate racial impact of a program or activity is, of course, not the end of the case. Rather a prima facie showing of discriminatory impact shifts the burden to the recipient of federal funds to demonstrate a sufficient nondiscriminatory justification for the program or activity. See *Bryan* v. *Koch*, 627 F. 2d 612, 623 (CA2 1980) (Kearse, J., concurring in part and dissenting in part). In this case, respondents failed to provide an adequate justification.

I also agree with JUSTICE WHITE, *ante*, at 584, n. 2, that the administrative regulations are valid even assuming, *arguendo*, that Title VI itself does not proscribe disparate-impact discrimination.

II

While agreeing that the Court of Appeals erred in requiring proof of discriminatory intent, JUSTICE WHITE has addressed an alternative ground for affirming the Court of Appeals judgment. He concludes that compensatory relief should not be awarded to private Title VI plaintiffs in the absence of proof of discriminatory animus. I cannot agree.

A

It is "well settled" that where legal rights have been invaded, "federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U. S. 678, 684 (1946). See, *e. g.*, *Sullivan* v. *Little Hunting Park*, 396 U. S. 229, 238–240 (1969); *Steele* v. *Louisville & Nashville R.*

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[16] Although we recognized in *Bakke* that our reasoning cast serious doubts on *Lau*, we took pains to explain that our decision was fully consistent with *Lau*. See 438 U. S., at 353. Indeed, we noted that the existence of an impact standard "strongly supports the view that voluntary race-conscious remedial action is permissible under Title VI." *Ibid.* As we explained, "[i]f discriminatory racial impact alone is enough to demonstrate at least a prima facie Title VI violation, it is difficult to believe that the Title would forbid the Medical School from attempting to correct the racially exclusionary effects of its initial admissions policy during the first two years of the School's operation." *Ibid.*

Co., 323 U. S. 192, 207 (1944) (courts have a "duty" to provide injunctive and damages remedies for violation of Railway Labor Act's command to represent union members without racial discrimination); *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, 288 (1940); *Texas & N. O. R. Co.* v. *Railway Clerks*, 281 U. S. 548, 569–570 (1930). In accord with *Bell* v. *Hood*, the Court has previously found no merit in "the contention that such remedies are limited to prospective relief." *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 434 (1964). Cf. *Schine Theatres* v. *United States*, 334 U. S. 110, 128 (1948) (Court "start[s] from the premise" that an injunction against future violations of a statute is inadequate). The use of all available judicial remedies, including compensatory relief, is no less appropriate to redress discrimination in violation of Title VI. "Congress has legislated and made its purpose clear; it has provided enough federal law . . . from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation." *United States* v. *Republic Steel Corp.*, 362 U. S. 482, 492 (1960). In Title VI actions, as in other private suits for violations of federal statutes, the federal judiciary may employ remedies "according to reasons related to the substantive social policy embodied in an act of positive law." *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 403, n. 4 (1971) (Harlan, J., concurring in judgment). See, *e. g.*, *Sullivan* v. *Little Hunting Park*, *supra*, at 239; *Wyandotte Transportation Co.* v. *United States*, 389 U. S. 191, 202 (1967); *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176 (1942); *Deitrick* v. *Greaney*, 309 U. S. 190, 200–201 (1940).

Denying private plaintiffs the right to recover compensatory relief for all violations involving programs with a discriminatory effect would frustrate the fundamental purpose of Title VI. Section 601 unequivocally creates victims' rights. But a right without an effective remedy has little meaning. See *Sullivan* v. *Little Hunting Park*, *supra*, at 238. As President Kennedy stated in his 1963 Message to Congress on Civil Rights, "[t]he venerable code of equity law commands 'for every wrong, a remedy.'" H. R. Doc. No. 124, 88th Cong., 1st Sess., 2 (1963). Noncompensatory relief by its very nature cannot "remedy" an injustice that has already occurred. A failure to correct adequately for individual violations depreciates the law, which was specifically intended to deal with "the injustices and humiliations of racial and other discrimination." H. R. Rep. No. 914, 88th Cong., 1st Sess., 18 (1963).

Indeed, the unavailability of a retrospective remedy may often result in the deprivation of *any* relief whatsoever. Many programs and activities receiving federal financial assistance, such as construction projects, are necessarily short in duration. By the time that a private plaintiff had successfully brought suit challenging discrimination in such a program, prospective relief could be a nullity. Cf., *e. g.*, *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920 (CA2 1968) (urban renewal project completed by the time the court recognized plaintiff's standing to sue).

Private retrospective relief also constitutes a "necessary supplement" to the administrative enforcement mechanism contained in Title VI. See *J. I. Case Co.* v. *Borak*, *supra*, at 432. The statutory sanction of a fund cutoff cannot sufficiently ensure general compliance with the command of Title VI, because the sheer quantity of federal financial assistance programs makes Government enforcement alone impractical[17] and because a fund cutoff is too Draconian to be widely used.[18] Retrospective liability for Title VI violations complements administrative enforcement by providing a more realistic deterrent against unlawful behavior. Moreover, the fund cutoff is no "remedy" at all for victims of past acts of discrimination because it merely assures that other innocent individuals will also be denied the benefits of federal assistance.[19] Regardless of the alternative administrative sanction, individual acts of discrimination still violate the law and can be remedied only by compensatory relief. Restricting relief to prospective remedies can only encourage recipients acting in bad faith to make no effort to comply with the statute and to stall private litigants in the knowledge that justice delayed will be justice denied.

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[17] See *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 401 (1968) ("When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law"). The Federal Government's actual performance under Title VI has been very inadequate. See *Brown* v. *Weinberger*, 417 F. Supp. 1215

B

"Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter* v. *Warner Co.*, 328 U. S. 395, 398 (1946). See *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361

(DC 1976); *Adams* v. *Weinberger*, 391 F. Supp. 269 (DC 1975); U. S. Commission on Civil Rights, The State of Civil Rights: 1977 (1978); U. S. Commission on Civil Rights, The State of Civil Rights: 1976 (1977); U. S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort (1970); Comptroller General, Agencies When Providing Federal Financial Assistance Should Ensure Compliance with Title VI (B–197815, Apr. 15, 1980); Wing, Title VI and Health Facilities: Forms Without Substance, 30 Hastings L. J. 137 (1978); Note, 65 Cornell L. Rev. 689, 692–695 (1980); Note, 85 Yale L. J. 721, 727–728 (1976); Comment, 36 Geo. Wash. L. Rev. 824 (1968).

[18] See, *e. g.*, Lamber, Private Causes of Action Under Federal Agency Nondiscrimination Statutes, 10 Conn. L. Rev. 859, 888, and n. 150 (1978) (because of "extreme and harsh" nature of the sanction, the Health, Education, and Welfare Department had terminated funding for only three educational institutions in 14 years).

[19] Congress itself noted that a cutoff was only to be a last resort after other devices, including lawsuits, failed. See, *e. g.*, 110 Cong. Rec. 7067 (1964) (Sen. Ribicoff); *id.*, at 5090, 6544 (Sen. Humphrey); *id.*, at 7103 (Sen. Javits).

U. S. 288, 291–292 (1960). In enacting Title VI, Congress clearly did not choose to restrict relief to prospective or noncompensatory remedies.[20]

When Congress has intended to place restrictions on private rights of action in the Civil Rights Act of 1964, it has proved capable of saying so explicitly. For example, Title II provides that a court may defer action on a private suit by referring the case to the Community Relations Services. 42 U. S. C. § 2000a–3(d). Similarly, Title VII conditions a private action on the plaintiff's having first brought a claim before the Equal Employment Opportunity Commission. § 2000e *et seq.* (1976 ed. and Supp. V). But nothing in Title VI or in its history supports a restriction on a federal court's ability to remedy a statutory violation.

C

JUSTICE WHITE attempts to justify the departure from well-established remedial principles by relying in large part on *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981). See *ante*, at 596–597. *Pennhurst* involved the Developmentally Disabled Assistance and Bill of Rights Act, 42 U. S. C. § 6000 *et seq.* (1976 ed. and Supp. V), a grant program through which the Federal Government provides funding to the States. The Court focused on § 111 of the Act, 42 U. S. C. § 6010, which states various rights of persons with developmental disabilities. "Noticeably absent" from the provision was "any language suggesting that

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[20] By contrast, in *Transmerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11 (1979), see *ante*, at 595–596, the Investment Advisors Act had created an explicit remedy in one section, which precluded the implicit creation of a damages remedy. Title VI, by contrast, contains no explicit private remedy and the administrative remedy is clearly not exclusive. Similarly, in *Cannon* v. *University of Chicago*, 441 U. S. 677, 705–706 (1979), this Court rejected the notion that an administrative mechanism was the exclusive remedy under Title IX of the Education Amendments of 1972.

§ 6010 is a 'condition' for the receipt of federal funding." 451 U. S., at 13. This omission stood in stark contrast to other sections of the Act. Because receipt of federal funds was not conditioned on compliance with § 6010, the Court held that § 6010 imposed no enforceable rights or obligations. The Court analogized spending power legislation to a contract, stating that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.*, at 17.[21]

In contrast to the statutory provision in *Pennhurst*, Title VI of the Civil Rights Act unambiguously imposes a condition on the grant of federal moneys. Section 601 of Title VI states that "[n]o person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U. S. C. § 2000d. Recipients of federal financial assistance are automatically subject to the nondiscrimination obligation imposed by the statute.

The statutory mandate can hardly escape notice. Every application for federal financial assistance must, "as a *condition* to its approval and the extension of any Federal financial assistance," contain assurances that the program will comply with Title VI *and* with all requirements imposed pursuant to the executive regulations issued under Title VI.[22] In fact, applicants for federal assistance literally sign contracts in which they agree to comply with Title VI and to "immediately take any measures necessary" to do so. This assurance is given "in consideration of" federal aid, and the Federal Government extends assistance "in reliance on" the assurance of compliance.[23] See 3 R. Cappalli, Federal Grants § 19:20, p. 57, and n. 12 (1982) (written assurances are merely a formality because the statutory mandate applies and is enforceable apart from the text of any agreement).

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[21] Only in dicta did the Court also discuss the question of the appropriate remedy for violation of conditions contained in an Act. 451 U. S., at 29. Because the Court of Appeals had not even addressed the issue, this Court did not purport to resolve the remedial question but merely remanded the matter for further consideration. *Id.*, at 30. Similarly, in *Rosado* v. *Wyman*, 397 U. S. 397 (1970), the Court never addressed the propriety of retrospective relief because the plaintiffs had requested only declaratory and injunctive relief against enforcement of a state law. See *id.*, at 421. JUSTICE WHITE finds solace in *Rosado*, see *ante*, at 596–597, even though that decision emphasized the authority of a federal court to oversee use of federal funds in a private suit notwithstanding Congress had lodged in an executive department the power to cut off federal funds for noncompliance with statutory requirements. 397 U. S., at 420.

The obligation to comply with § 601 does not place upon a recipient unanticipated burdens because any recipient must anticipate having to comply with the law. Certainly no applicant has a legitimate expectation that he can evade the statutory obligation and the expense that compliance may entail. Indeed, in extending grants the United States has always retained an inherent right to sue for enforcement of the recipient's obligation.[24] All traditional judicial remedies can

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[22] See 7 CFR § 15.4 (1982) (Dept. of Agriculture); 15 CFR § 8.5 (1982) (Dept. of Commerce); 32 CFR § 300.6 (1982) (Dept. of Defense); 34 CFR § 100.4 (1982) (Dept. of Education); 10 CFR § 1040.4 (1982) (Dept. of Energy); 45 CFR § 80.4 (1982) (Dept. of Health and Human Services); 24 CFR § 1.5 (1982) (Dept. of Housing and Urban Development); 43 CFR § 17.4 (1982) (Dept. of the Interior); 28 CFR § 42.105 (1982) (Dept. of Justice); 29 CFR § 31.6 (1982) (Dept. of Labor); 22 CFR § 141.4 (1982) (Dept. of State); 49 CFR § 21.7 (1982) (Dept. of Transportation); 31 CFR § 51.59 (1982) (Dept. of Treasury).

[23] See, *e. g.*, Assurance of Compliance with the Department of Health, Education, and Welfare Regulation under Title VI of the Civil Rights Act of 1964, reprinted in 3 R. Cappalli, Federal Grants, Appendix 19–G (1982).

[24] *E. g.*, *Rex Trailer Co.* v. *United States*, 350 U. S. 148, 151 (1956); *United States* v. *San Francisco*, 310 U. S. 16, 31 (1940); *Cotton* v. *United States*, 11 How. 229, 231 (1851); *Dugan* v. *United States*, 3 Wheat. 172, 181 (1818). As this Court once said with respect to a grant of lands by the Federal Government to a State:

"It is not doubted that the grant by the United States to the State upon conditions, and the acceptance of the grant by the State, constituted a contract. All the elements of a contract met in the transaction,—competent be applied in such situations.[25] This right to sue is equally applicable to Title VI. See 42 U. S. C. § 2000h–3. For example, in *United States* v. *Marion County School Dist.*, 625 F. 2d 607 (CA5 1980), the court concluded "that the United States is entitled to sue to enforce contractual assurances of compliance with Title VI's prohibition against discrimination in the operation of federally-funded schools, and that the United States is entitled to whatever relief is necessary to enforce such assurances, including 'transportation relief.'" *Id.*, at 617.[26]

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parties, proper subject-matter, sufficient consideration, and consent of minds. This contract was binding upon the State." *McGee* v. *Mathis*, 4 Wall. 143, 155 (1866).

[25] See, *e. g.*, *Rex Trailer Co.* v. *United States*, *supra*, at 151; *United States* v. *Stevenson*, 215 U. S. 190, 197 (1909); *Cotton* v. *United States*, *supra*, at 231; *Dugan* v. *United States*, *supra*, at 181.

[26] Accord, *e. g.*: *Brown* v. *Califano*, 201 U. S. App. D. C. 235, 246, 627 F. 2d 1221, 1232 (1980); *United States* v. *Tatum Independent School Dist.*, 306 F. Supp. 285, 288 (ED Tex. 1969); *United States* v. *Frazer*, 297 F. Supp. 319 (MD Ala. 1968), 317 F. Supp. 1079 (MD Ala. 1970) (broad remedial order); *United States* v. *Board of Education*, 295 F. Supp. 1041 (SD Ga. 1969). See also, *e. g.*, *United States* v. *Harrison County, Miss.*, 399 F. 2d 485 (CA5 1968), cert. denied, 397 U. S. 918 (1970); *United States* v. *County School Bd.*, 221 F. Supp. 93 (ED Va. 1963). The Civil Rights Act of 1964 itself provides for compliance by any other lawful means and for suits by the Government. § 602, 42 U. S. C. § 2000d–1; § 1103, 42 U. S. C. § 2000h–3. See 110 Cong. Rec. 7060 (1964) (Sen. Pastore) (agency may sue to enforce contractual nondiscrimination requirement); *id.*, at 7066 (Sen. Ribicoff) (calling such a suit "the most effective way for an agency to proceed"). Shortly after the Act was passed, agencies charged with its execution confirmed the availability of governmental suits to enforce Title VI. *E. g.*, 29 Fed. Reg. 16301 (1964) (HEW). See 31 Fed. Reg. 5292 (1966) (Department of Justice Guidelines for Enforcement of Title VI) ("Possibilities of judicial enforcement include (1) a suit to obtain specific enforcement of assurances . . ."). Indeed, even before enactment of the Civil Rights Act of 1964, the President had asserted authority to impose nondiscrimination obligations on the extension of certain forms of federal financial assistance. See Exec. Order No. 10925, 3 CFR 448 (1959–1963 Comp.); Exec. Order No. 11114, 3 CFR 774 (1959–1963 Comp.). Title VI resolved any questions about the President's authority to enforce such

When respondents requested, received, and expended federal funds to pay the salaries of policemen and trainees and to finance recruitment programs, 466 F. Supp. 1273, 1281 (SDNY 1979), their duty not to discriminate was manifest. The obligation to comply with the law attached at the time respondents agreed to take federal money, not when the District Court concluded that respondents had violated the law. Thus, the District Court properly provided a remedy for *past* failure to carry out the statutory obligation. The relief fashioned by the District Court requires respondents to remedy their failure to shoulder the burden that existed from the moment they received federal funding.

The analogy drawn in *Pennhurst* between the acceptance of funds under spending legislation and the formation of a contract only reinforces the propriety of awarding retrospective relief. Having benefited from federal financial assistance conditioned on an obligation not to discriminate, recipients of federal aid must be held to their part of the bargain. Yet, JUSTICE WHITE would allow recipients to violate the conditions of their contracts until a court identifies the violation and either enjoins its continuance or orders the recipient to begin performing its duties incident to the receipt of federal money. See *ante*, at 602–603. This is surely a bizarre view of contract law.[27]

Only by providing retrospective relief to private litigants can the courts fulfill the terms of the "contract" between the

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obligations since it was undisputed that Congress had the constitutional power to attach reasonable conditions under the Spending Clause. See 3 R. Cappalli, *supra*, § 19:14, at 38.

[27] JUSTICE WHITE notes that the Federal Government can sue recipients who fail to comply with grant agreements and force the violators to repay funds. See *ante*, at 603, n. 24. But this merely demonstrates that recipients do not have any legitimate expectations that only limited injunctive relief is available as a remedy for violations of the statute. Moreover, the grant agreements under Title VI specifically mention compliance with the executive regulations, which unambiguously incorporate an effects standard.

Federal Government and recipients of federal financial assistance. In exchange for federal moneys, recipients have promised not to discriminate. Because Title VI is intended to ensure that "no person" is subject to discrimination in federally assisted programs, private parties function as third-party beneficiaries to these contracts. *Lau* v. *Nichols*, 414 U. S , at 571, n. 2 (Stewart, J., concurring in result). See Restatement (Second) of Contracts § 304 (1981). When a court concludes that a recipient has breached its contract, it should enforce the broken promise by protecting the expectation that the recipient would not discriminate. See *id.* § 344, Comment *a.* The obvious way to do this is to put private parties in as good a position as they would have been had the contract been performed. This requires precisely the kind of make-whole remedy that JUSTICE WHITE rejects, see *ante*, at 602–603, despite his accurate characterization of Title VI as a "'contractual' spending-power provision," *ante*, at 599.[28]

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[28] JUSTICE WHITE's approach is also fraught with the serious difficulties inherent in attempting to classify relief as either retrospective or prospective. For example, Judge Meskill thought that the order that a new sergeant's examination be given was prospective and noncompensatory, 633 F. 2d, at 255–256, n. 43, but JUSTICE WHITE adopts the contrary position, *ante*, at 605, 606. Judge Coffrin thought that constructive seniority was noncompensatory. "This court should not view such a remedy as retrospective compensation for past harm simply because the judicial process takes time." 633 F. 2d, at 274, n. 2 (concurring). JUSTICE WHITE obviously disagrees, *ante*, at 606.

JUSTICE WHITE rests his analysis on *Edelman* v. *Jordan*, 415 U. S. 651, 667 (1974), see *ante*, at 604. But Eleventh Amendment considerations have absolutely no relevance to this case because respondents are not state but rather municipal entities. See *Mt. Healthy City School Dist. Bd. of Education* v. *Doyle*, 429 U. S. 274, 280 (1977) (local governments have no immunity against retroactive liability). Even accepting the relevance of *Edelman*, the resulting characterizations of the relief in this case are questionable. For instance, the order placing the police officers who were victims of discrimination in the position on the seniority roster that they would have occupied but for the discriminatory examinations certainly alters their employment status for the future. Just because a program is also "compensatory" in nature is clearly not controlling under the Eleventh

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For the foregoing reasons, I would hold that a court has broad discretion to remedy violations of Title VI in actions brought by private parties. Of course, in determining appropriate relief, a court must exercise its discretion equitably. This requires consideration of a myriad of factors including the potential for unreasonable hardship to the party in breach, the extent of mitigation, and the like. The details of the relief would normally be best left to the sound judgment of the District Court. As the District Court noted, remedies adopted in Title VII suits provide a useful guidepost. 466 F. Supp., at 1287; see also *Association Against Discrimination* v. *City of Bridgeport*, 479 F. Supp. 101, 112 (Conn. 1979). In my view, the relief ordered by the District Court in this case was entirely appropriate.

III

Because the relief petitioners received was available to them under Title VI, and because that relief was justified without proof of discriminatory intent, I would reverse the judgment of the Court of Appeals. Accordingly, I dissent.

Amendment. In considering compensatory and remedial educational programs in *Milliken* v. *Bradley*, 433 U. S. 267 (1977), we stated:

"That the programs are also 'compensatory' in nature does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment." *Id.*, at 290 (emphasis in original) (footnote omitted).

Finally, even if the Eleventh Amendment applied, the relief would not necessarily be inappropriate. In *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964), we held that by choosing to operate a railroad, Alabama became subject to duties imposed by the Federal Employers' Liability Act, and could be held liable in an action for damages for violations of these duties. A similar analysis could be applied with respect to the receipt of federal funds.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

It is not an easy task to harmonize the Court's cases under Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U. S. C. § 2000d *et seq.* (1976 ed. and Supp. V). Unless the Court is to repudiate what it has already written, however, I believe the judgment of the Court of Appeals must be reversed. I reach this conclusion by answering three separate questions: (1) whether federal law authorizes private individuals to recover damages for injuries caused by violations of Title VI and the regulations promulgated thereunder; (2) if so, whether Title VI requires recipients of federal funds to do any more than refrain from engaging in conduct that would, if performed by a State, violate the Fourteenth Amendment; and (3) if not, whether an administrative agency may validly impose additional requirements on recipients of funds from that agency. I shall discuss each question in turn.

I

In the last five years at least eight Members of this Court have endorsed the view that Title VI, as well as the comparable provisions of Title IX of the Education Amendments of 1972, may be enforced in a private action against recipients of federal funds, such as the respondents in this case.[1] This

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[1] Six Members of the Court—CHIEF JUSTICE BURGER, JUSTICE BRENNAN, Justice Stewart, JUSTICE MARSHALL, JUSTICE REHNQUIST, and JUSTICE STEVENS—endorsed the view that a private right of action exists directly under Title VI and Title IX. *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979); *University of California Regents* v. *Bakke*, 438 U. S. 265, 418–421 (1978) (STEVENS, J., joined by BURGER, C. J., and Stewart and REHNQUIST, JJ., dissenting). Two Members of the Court—JUSTICE WHITE and JUSTICE BLACKMUN—endorsed the view that private individuals may enforce Title VI and Title IX against appropriate defendants under 42 U. S. C. § 1983. *Cannon*, *supra*, at 722–724 (WHITE, J., joined by BLACKMUN, J., dissenting).

Court has authorized relief in at least four such cases. *Lau* v. *Nichols*, 414 U. S. 563 (1974); *Hills* v. *Gautreaux*, 425 U. S. 284 (1976); *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978); *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979).

JUSTICE WHITE suggests that some plaintiffs who prevail in suits under Title VI are entitled only to a limited form of prospective relief.[2] That suggestion is somewhat surprising, since no Member of the Court in *Lau*, *Bakke*, or *Cannon* mentioned such a limitation on remedies. Presumably, it rests on a belief that Congress, in enacting Title VI, intended to distinguish between prospective and retroactive relief. Yet it seems to me most improbable that Congress contemplated so significant and unusual a limitation on the forms of relief available to a victim of racial discrimination, but said absolutely nothing about it in the text of the statute. It is one thing to conclude, as the Court did in *Cannon*, that the 1964 Congress, legislating when implied causes of action were the rule rather than the exception, reasonably assumed that the intended beneficiaries of Title VI would be able to vindicate their rights in court. It is quite another thing to believe that the 1964 Congress substantially qualified that assumption but thought it unnecessary to tell the Judiciary about the qualification.

In reaching his novel conclusion about the scope of available relief under Title VI, JUSTICE WHITE relies heavily on the proposition that *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981), establishes a "presumption that only limited injunctive relief should be granted as a remedy for violations of statutes passed pursuant to the spending power." *Ante*, at 602. That characterization seriously distorts the opinion of the Court in *Pennhurst*, which concerned the existence or nonexistence of statutory rights, not remedies.[3] We held that Congress will not be presumed to have created substantive legal obligations under the spending power by legislation so ambiguous that "a State is unaware of the conditions or is unable to ascertain what is expected of it." 451 U. S., at 17.[4] In dictum,[5] we went on to speculate that an injunction requiring a State to provide "'appropriate' treatment in the 'least restrictive' environment" might be improper, noting that the Eleventh Amendment prohibits federal courts from requiring States to pay money damages. *Id.*, at 29–30. Without explaining why, JUSTICE WHITE divines a general principle of statutory interpretation from this discussion of the Eleventh Amendment. The Eleventh Amendment obviously has no relevance in most Title VI litigation; it certainly is not implicated in this suit against the officials and agencies of the City of New York. I cannot fathom the supposition that Congress regularly analogizes to the Eleventh Amendment when it drafts spending power legislation. There is certainly nothing in the text or the legislative history of Title VI to suggest that the 1964 Congress did so.

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[2] He limits his analysis to situations where no discriminatory intent is shown. *Ante*, at 597.

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[3] We framed our opinion as follows:

"Petitioners first contend that 42 U. S. C. § 6010 does not create in favor of the mentally retarded any substantive rights to 'appropriate treatment' in the 'least restrictive' environment. Assuming that Congress did intend to create such a right, petitioners question the authority of Congress to impose these affirmative obligations on the States under either its spending power or § 5 of the Fourteenth Amendment. Petitioners next assert that any rights created by the Act are enforceable in federal court only by the Federal Government, not by private parties. Finally, petitioners argue that the court below read the scope of any rights created by the Act too broadly and far exceeded its remedial powers in requiring the Commonwealth to move its residents to less restrictive environments and create individual habilitation plans for the mentally retarded. *Because we agree with petitioners' first contention—that § 6010 simply does not create substantive rights—we find it unnecessary to address the remaining issues.*" 451 U. S., at 10–11 (emphasis added).

[4] Obviously, there can be no argument that the respondent Police Department in this case was unaware of its obligations. Both the statute and the regulations clearly prohibit racial discrimination, and they did so at the time the respondent accepted the federal money.

[5] After the sentence fragment quoted *ante*, at 597, the Court concluded: "These are all difficult questions. Because the Court of Appeals has not addressed these issues, however, we remand the issues for consideration in light of our decision here." 451 U. S., at 30.

Even if it were not settled by now that Title VI authorizes appropriate relief, both prospective and retroactive, to victims of racial discrimination at the hands of recipients of federal funds, the same result would follow in *this* case because the petitioners have sought relief under 42 U. S. C. § 1983. While Title VI applies to all recipients of federal funds, § 1983 governs a different class of persons: those who act "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." Our past decisions establish that respondent Police Department in this case is bound by § 1983 as well as by Title VI. *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978). Our past decisions also establish that § 1983 provides a damages remedy. *Ibid.* And finally, it is clear that the § 1983 remedy is intended to redress the deprivation of rights secured by all valid federal laws, including statutes and regulations having the force of law. See *Maine* v. *Thiboutot*, 448 U. S. 1 (1980).[6] See also *Cannon*, 441 U. S., at 722–724 (WHITE, J., dissenting); *ante*, at 594, n. 17.

The policy arguments JUSTICE WHITE advances in support of his position may be perfectly sound. There may well be situations in which one would fear that strict retroactive enforcement of a federal grant condition would discourage grant applications that are a high federal priority.[7] These are,

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[6] *Thiboutot* itself involved only federal statutes, not regulations. Its analysis of § 1983, however, applies equally to administrative regulations having the force of law. See *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 301–303 (1979) (discussing what types of administrative regulations have "the force and effect of law").

[7] I must point out, however, that the record in this case gives no basis for thinking that the cost of an appropriate award of damages to the petitioners would exceed the total amount of respondents' federal subsidy. And, as a general proposition, it is usually assumed that a cutoff of federal

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however, arguments that should be addressed to Congress rather than to a court, cf. *Cannon*, 441 U. S., at 709–710, since Congress has already implicitly authorized the Federal Judiciary to award appropriate relief to private parties injured by violations of Title VI. Whether these petitioners are within that special class is, of course, another question to which I now turn.

II

In *University of California Regents* v. *Bakke*, 438 U. S., at 412–418, four Justices expressed the opinion that Title VI's prohibition against racial discrimination is significantly broader than the protection provided by the Equal Protection Clause of the Fourteenth Amendment. That position was a dissenting one, however; five Members of the Court unequivocally rejected it.

In his opinion announcing the judgment of the Court, JUSTICE POWELL reviewed the legislative history of Title VI and concluded:

> "In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.*, at 287.

JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN reached the same conclusion. They wrote:

> "In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies. . . ." *Id.*, at 328.[8]

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funds would be significantly more drastic than an individualized remedy for the victim of a Title VI violation. See *Cannon*, 441 U. S., at 705, and n. 38.

[8] Accord, 438 U. S., at 332, 333, 334, n. 11, 336, 338. Towards the end of their opinion, JUSTICES BRENNAN, WHITE, MARSHALL, and BLACKMUN expressly considered and rejected the argument that the Court's earlier decision in *Lau* v. *Nichols*, 414 U. S. 563 (1974), foreclosed their reading of Title VI. See 438 U. S., at 352–353.

Later in their opinion, they summarized the reasoning that led them to that conclusion:

> "Congress' equating of Title VI's prohibition with the commands of the Fifth and Fourteenth Amendments, its refusal precisely to define that racial discrimination which it intended to prohibit, and its expectation that the statute would be administered in a flexible manner, compel the conclusion that Congress intended the meaning of the statute's prohibition to evolve with the interpretation of the commands of the Constitution." *Id.*, at 340.[9]

The interpretation of Title VI adopted by a majority in *Bakke* was confirmed in two subsequent opinions of the Court. In *Steelworkers* v. *Weber*, 443 U. S. 193, 206, n. 6 (1979), the Court distinguished Title VII from Title VI on the basis that the former provision "was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments."[10] And in *Board of Education, New York City* v. *Harris*, 444 U. S. 130 (1979), the Court first concluded that the 1972 Emergency School Aid Act (ESAA), 86 Stat. 354, contemplates funding cutoffs in response to forms of discrimination that are not "discrimination in the Fourteenth Amendment sense." 444 U. S., at 149. The Court then went on, in considered dictum, to distinguish the ESAA from Title VI:

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[9] Of course, in *Washington* v. *Davis*, 426 U. S. 229 (1976), the Court held that the Fourteenth Amendment is violated only by *purposeful* state racial discrimination.

[10] The Court explained:

"Title VI of the Civil Rights Act of 1964, considered in *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978), contains no provision comparable to § 703(j) [of Title VII]. This is because Title VI was an exercise of federal power over a matter in which the Federal Government was already directly involved: the prohibitions against race-based conduct contained in Title VI governed 'program[s] or activit[ies] receiving Federal financial assistance.' 42 U. S. C. § 2000d. Congress was legislating to assure federal funds would not be used in an improper manner. Title VII, by contrast, was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments. Title VII and Title VI, therefore, cannot be read *in pari materia*." 443 U. S., at 206, n. 6.

> "A violation of Title VI may result in a cutoff of all federal funds, and it is likely that Congress would wish this drastic result only when discrimination is intentional. In contrast, only ESAA funds are rendered unavailable when an ESAA violation is found." *Id.*, at 150.[11]

The question to be decided today is not whether the Court has misread the actual intent of the Congress that enacted the Civil Rights Act of 1964. For when the Court unequivocally rejects one reading of a statute, its action should be respected in future litigation. Compare *United States* v. *Board of Comm'rs of Sheffield, Ala.*, 435 U. S. 110, 140–150 (1978) (STEVENS, J., dissenting), with *Dougherty County Board of Education* v. *White*, 439 U. S. 32, 47 (1978) (STEVENS, J., concurring), and *City of Rome* v. *United States*, 446 U. S. 156, 191 (1980) (STEVENS, J., concurring). See also *Runyon* v. *McCrary*, 427 U. S. 160, 189–192 (1976) (STEVENS, J., concurring). If a statute is to be amended after it has been authoritatively construed by this Court, that task should almost always be performed by Congress.[12]

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[11] In his dissenting opinion, Justice Stewart, joined by JUSTICES POWELL and REHNQUIST, also noted that Title VI "has been construed to contain not a mere disparate-impact standard, but a standard of intentional discrimination." 444 U. S., at 159–160.

[12] Like most, this proposition of law is not wholly without exceptions. Congress phrased some older statutes in sweeping, general terms, expecting the federal courts to interpret them by developing legal rules on a case-by-case basis in the common-law tradition. One clear example of such a statute is the Sherman Act, 26 Stat. 209. See *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 687–688 (1978); *Associated General Contractors of California, Inc.* v. *Carpenters*, 459 U. S. 519, 531–535 (1983). For that reason, in *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977), the doctrine of *stare decisis* did not preclude the Court from overruling its prior decision in *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967), even though Congress had

Title VI must therefore mean what this Court has said it means, regardless of what some of us may have thought it meant before this Court spoke. Today, proof of invidious purpose is a necessary component of a valid Title VI claim.

III

The respondent Police Department in this case sought, received, and expended federal grants to pay the salaries of policemen and to finance its recruitment programs. In order to obtain funds from the Department of Labor, the Department of Justice, and the Department of Housing and Urban Development, see App. A123, it was required to promise not only that it would comply with Title VI, but also that it would abide by departmental regulations implementing that statute.[13] Ever since 1964, all three Departments have had virtually identical implementing regulations. Significantly, those regulations do more than merely prohibit grant recipients from administering the funds with a discriminatory purpose; they require recipients to administer the grants in a manner that has no racially discriminatory *effects.*[14]

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not acted during the intervening decade. Cf. *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 695–701 (1978) (overruling an erroneous interpretation of § 1983 in *Monroe* v. *Pape*, 365 U. S. 167 (1961), despite the absence of congressional action). Title VI is different from those statutes, because Congress expected most interstitial lawmaking to be performed by administrative agencies, not courts.

[13] One standard application form requires the following certification:

"The grantee hereby assures and certifies that it will comply with the regulations, policies, guidelines and requirements with respect to the acceptance and use of Federal funds for this federally-assisted program. Also, the grantee gives assurances and certifies with respect to the grant that:

. . . . .

"(6) The grant will be conducted and administered in compliance with:

"(a) Title VI of the Civil Rights Act of 1964 (Pub. L. 88–352) *and implementing regulations* . . . ." Form HUD 4124 (emphasis added).

[14] For example, the regulations provide:

"A recipient, in determining the . . . benefits which will be provided under any such program, . . . may not, directly or through contractual or other

This Court has repeatedly upheld the validity of those regulations and their "effects" standard. *Lau* v. *Nichols*, 414 U. S., at 568; *id.*, at 571 (Stewart, J., concurring); *Fullilove* v. *Klutznick*, 448 U. S. 448, 479 (1980) (opinion of BURGER, C. J.). The reason is that Title VI explicitly authorizes "[e]ach Federal department and agency which is empowered to extend Federal financial assistance . . . to effectuate the provisions of section 601 . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance . . . ." 78 Stat. 252, 42 U. S. C. §2000d–1. Nothing in the regulations is inconsistent with any of the statutes authorizing the disbursement of the grants that the respondent Police Department received.[15]

It is well settled that when Congress explicitly authorizes an administrative agency to promulgate regulations implementing a federal statute that governs completely private conduct, those regulations have the force of law so long as they are "reasonably related to the purposes of the enabling legislation." *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356, 369 (1973). See also *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 301–306 (1979); *Batterton* v. *Francis*, 432 U. S. 416, 425, n. 9 (1977). See generally K. Davis, Administrative Law Treatise §7.8 (2d ed. 1980 and Supp. 1982). The presumption of validity must be at least as strong when a regulation does not seek to control the conduct of independent private parties, but merely defines the terms on which someone may seek federal money. By prohibiting grant recipients from adopting procedures that deny program benefits to members of any racial group, the administrative

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arrangements, utilize criteria . . . which . . . have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect to persons of a particular race, color, or national origin." 24 CFR §1.4(b)(2) (1982); 28 CFR §42.104(b)(2) (1982); 29 CFR §31.3(b)(2) (1982).

[15] Indeed, even in the absence of Title VI, one would expect the administrative agencies to distribute the grants in a way that will benefit all segments of the communities they seek to serve.

agencies have acted in a reasonable manner to further the purposes of Title VI.[16]

The reasonableness of the agencies' method of implementation is apparent from the Court's opinion in *City of Rome* v. *United States*, 446 U. S., at 173–178, which held that even if § 1 of the Fifteenth Amendment only prohibits purposeful racial discrimination in voting, Congress may implement that prohibition by banning voting practices that are discriminatory in effect. At the dawn of this century, this Court unanimously held that an administrative regulation's conformity to statutory authority was to be measured by the same standard as a statute's conformity to constitutional authority. In *Boske* v. *Comingore*, 177 U. S. 459, 470 (1900), we wrote:

> "In determining whether the regulations promulgated by [the Secretary of the Treasury] are consistent with law, we must apply the rule of decision which controls when an act of Congress is assailed as not being within the powers conferred upon it by the Constitution; that is to say, a regulation adopted under section 161 of the Revised Statutes should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress."

Since an "effects" standard is an appropriate means for Congress to implement a constitutional prohibition against discrimination, an "effects" regulation is an equally appropriate means for an administrative agency to implement a comparable statutory prohibition.[17]

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[16] Those purposes are evident from the statutory language:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in [or] be denied the benefits of . . . any program or activity receiving Federal financial assistance." 78 Stat. 252, 42 U. S. C. § 2000d.

Thus, although the petitioners had to prove that the respondents' actions were motivated by an invidious intent in order to prove a violation of the statute, they only had to show that the respondents' actions were producing discriminatory effects in order to prove a violation of valid federal law.

IV

The District Court found that the respondent Police Department in this case was making entry-level appointments in a manner that had a discriminatory impact on blacks and Hispanics. That conduct violated the petitioners' rights under regulations promulgated by the Department of Labor, the Department of Justice, and the Department of Housing and Urban Development. The petitioners were therefore entitled to the compensation they sought under 42 U. S. C. § 1983 and were awarded by the District Court.[18] I would reverse the judgment of the Court of Appeals.

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[17] Earlier in the *Boske* opinion the Court had noted that there was "certainly no statute which expressly or by necessary implication forbade the adoption of such a regulation." 177 U. S., at 469. The same may be said of the regulations at issue in this case. For although the Court has determined that Title VI does not *compel* the application of an effects standard, see *supra*, at 639–642, I do not believe that Congress should be understood to have *prohibited* regulations adopting such a standard, especially given the passages from the legislative history of Title VI identified in *Bakke*, 438 U. S., at 413–418, nn. 11, 13, 15, 16, 19, 23 (STEVENS, J., dissenting), and Congress' acquiescence in those regulations since 1964.

[18] Because respondent Police Department acted under color of state law in making appointments, § 1983 authorizes a lawsuit against it, based on its violation of the governing administrative regulations. This does not mean, as JUSTICE POWELL suggests, *ante*, at 608, n. 1, that a similar action would be unavailable against a similarly situated private party. Whether a cause of action against private parties exists directly under the regulations and, if so, what the standard of liability in such an action would be, are questions that are not presented by this case.

DIRKS *v.* SECURITIES AND EXCHANGE COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82–276. Argued March 21, 1983—Decided July 1, 1983

While serving as an officer of a broker-dealer, petitioner, who specialized in providing investment analysis of insurance company securities to institutional investors, received information from a former officer of an insurance company that its assets were vastly overstated as the result of fraudulent corporate practices and that various regulatory agencies had failed to act on similar charges made by company employees. Upon petitioner's investigation of the allegations, certain company employees corroborated the fraud charges, but senior management denied any wrongdoing. Neither petitioner nor his firm owned or traded any of the company's stock, but throughout his investigation he openly discussed the information he had obtained with a number of clients and investors, some of whom sold their holdings in the company. The Wall Street Journal declined to publish a story on the fraud allegations, as urged by petitioner. After the price of the insurance company's stock fell during petitioner's investigation, the New York Stock Exchange halted trading in the stock. State insurance authorities then impounded the company's records and uncovered evidence of fraud. Only then did the Securities and Exchange Commission (SEC) file a complaint against the company, and only then did the Wall Street Journal publish a story based largely on information assembled by petitioner. After a hearing concerning petitioner's role in the exposure of the fraud, the SEC found that he had aided and abetted violations of the antifraud provisions of the federal securities laws, including § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b–5, by repeating the allegations of fraud to members of the investment community who later sold their stock in the insurance company. Because of petitioner's role in bringing the fraud to light, however, the SEC only censured him. On review, the Court of Appeals entered judgment against petitioner.

Held:

1. Two elements for establishing a violation of § 10(b) and Rule 10b–5 by corporate insiders are the existence of a relationship affording access to inside information intended to be available only for a corporate purpose, and the unfairness of allowing a corporate insider to take advan-

tage of that information by trading without disclosure. A duty to disclose or abstain does not arise from the mere possession of nonpublic market information. Such a duty arises rather from the existence of a fiduciary relationship. *Chiarella* v. *United States*, 445 U. S. 222. There must also be "manipulation or deception" to bring a breach of fiduciary duty in connection with a securities transaction within the ambit of Rule 10b–5. Thus, an insider is liable under the Rule for inside trading only where he fails to disclose material nonpublic information before trading on it and thus makes secret profits. Pp. 653–654.

2. Unlike insiders who have independent fiduciary duties to both the corporation and its shareholders, the typical tippee has no such relationships. There must be a breach of the insider's fiduciary duty before the tippee inherits the duty to disclose or abstain. Pp. 654–664.

(a) The SEC's position that a tippee who knowingly receives nonpublic material information from an insider invariably has a fiduciary duty to disclose before trading rests on the erroneous theory that the antifraud provisions require equal information among all traders. A duty to disclose arises from the relationship between parties and not merely from one's ability to acquire information because of his position in the market. Pp. 655–659.

(b) A tippee, however, is not always free to trade on inside information. His duty to disclose or abstain is derivative from that of the insider's duty. Tippees must assume an insider's duty to the shareholders not because they receive inside information, but rather because it has been made available to them improperly. Thus, a tippee assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach. Pp. 659–661.

(c) In determining whether a tippee is under an obligation to disclose or abstain, it is necessary to determine whether the insider's "tip" constituted a breach of the insider's fiduciary duty. Whether disclosure is a breach of duty depends in large part on the personal benefit the insider receives as a result of the disclosure. Absent an improper purpose, there is no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach. Pp. 661–664.

3. Under the inside-trading and tipping rules set forth above, petitioner had no duty to abstain from use of the inside information that he obtained, and thus there was no actionable violation by him. He had no pre-existing fiduciary duty to the insurance company's shareholders. Moreover, the insurance company's employees, as insiders, did not vio-

late their duty to the company's shareholders by providing information to petitioner. In the absence of a breach of duty to shareholders by the insiders, there was no derivative breach by petitioner. Pp. 665–667.

220 U. S. App. D. C. 309, 681 F. 2d 824, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 667.

David Bonderman argued the cause for petitioner. With him on the briefs were *Lawrence A. Schneider* and *Eric Summergrad.*

Paul Gonson argued the cause for respondent. With him on the brief were *Daniel L. Goelzer, Jacob H. Stillman,* and *Whitney Adams.**

JUSTICE POWELL delivered the opinion of the Court.

Petitioner Raymond Dirks received material nonpublic information from "insiders" of a corporation with which he had no connection. He disclosed this information to investors who relied on it in trading in the shares of the corporation. The question is whether Dirks violated the antifraud provisions of the federal securities laws by this disclosure.

I

In 1973, Dirks was an officer of a New York broker-dealer firm who specialized in providing investment analysis of insurance company securities to institutional investors.[1] On

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**Solicitor General Lee, Assistant Attorney General Jensen, Stephen M. Shapiro, Deputy Assistant Attorney General Olsen, David A. Strauss,* and *Geoffrey S. Stewart* filed a brief for the United States as *amicus curiae* urging reversal.

Edward H. Fleischman, Richard E. Nathan, Martin P. Unger, and *William J. Fitzpatrick* filed a brief for the Securities Industry Association as *amicus curiae.*

[1] The facts stated here are taken from more detailed statements set forth by the Administrative Law Judge, App. 176–180, 225–247; the opinion of the Securities and Exchange Commission, 21 S. E. C. Docket 1401, 1402–

March 6, Dirks received information from Ronald Secrist, a former officer of Equity Funding of America. Secrist alleged that the assets of Equity Funding, a diversified corporation primarily engaged in selling life insurance and mutual funds, were vastly overstated as the result of fraudulent corporate practices. Secrist also stated that various regulatory agencies had failed to act on similar charges made by Equity Funding employees. He urged Dirks to verify the fraud and disclose it publicly.

Dirks decided to investigate the allegations. He visited Equity Funding's headquarters in Los Angeles and interviewed several officers and employees of the corporation. The senior management denied any wrongdoing, but certain corporation employees corroborated the charges of fraud. Neither Dirks nor his firm owned or traded any Equity Funding stock, but throughout his investigation he openly discussed the information he had obtained with a number of clients and investors. Some of these persons sold their holdings of Equity Funding securities, including five investment advisers who liquidated holdings of more than $16 million.[2]

While Dirks was in Los Angeles, he was in touch regularly with William Blundell, the Wall Street Journal's Los Angeles bureau chief. Dirks urged Blundell to write a story on the fraud allegations. Blundell did not believe, however, that such a massive fraud could go undetected and declined to

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1406 (1981); and the opinion of Judge Wright in the Court of Appeals, 220 U. S. App. D. C. 309, 314–318, 681 F. 2d 824, 829–833 (1982).

[2] Dirks received from his firm a salary plus a commission for securities transactions above a certain amount that his clients directed through his firm. See 21 S. E. C. Docket, at 1402, n. 3. But "[i]t is not clear how many of those with whom Dirks spoke promised to direct some brokerage business through [Dirks' firm] to compensate Dirks, or how many actually did so." 220 U. S. App. D. C., at 316, 681 F. 2d, at 831. The Boston Company Institutional Investors, Inc., promised Dirks about $25,000 in commissions, but it is unclear whether Boston actually generated any brokerage business for his firm. See App. 199, 204–205; 21 S. E. C. Docket, at 1404, n. 10; 220 U. S. App. D. C., at 316, n. 5, 681 F. 2d, at 831, n. 5.

write the story. He feared that publishing such damaging hearsay might be libelous.

During the 2-week period in which Dirks pursued his investigation and spread word of Secrist's charges, the price of Equity Funding stock fell from $26 per share to less than $15 per share. This led the New York Stock Exchange to halt trading on March 27. Shortly thereafter California insurance authorities impounded Equity Funding's records and uncovered evidence of the fraud. Only then did the Securities and Exchange Commission (SEC) file a complaint against Equity Funding[3] and only then, on April 2, did the Wall Street Journal publish a front-page story based largely on information assembled by Dirks. Equity Funding immediately went into receivership.[4]

The SEC began an investigation into Dirks' role in the exposure of the fraud. After a hearing by an Administrative Law Judge, the SEC found that Dirks had aided and abetted violations of § 17(a) of the Securities Act of 1933, 48 Stat. 84, as amended, 15 U. S. C. § 77q(a),[5] § 10(b) of the Securities

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[3] As early as 1971, the SEC had received allegations of fraudulent accounting practices at Equity Funding. Moreover, on March 9, 1973, an official of the California Insurance Department informed the SEC's regional office in Los Angeles of Secrist's charges of fraud. Dirks himself voluntarily presented his information at the SEC's regional office beginning on March 27.

[4] A federal grand jury in Los Angeles subsequently returned a 105-count indictment against 22 persons, including many of Equity Funding's officers and directors. All defendants were found guilty of one or more counts, either by a plea of guilty or a conviction after trial. See Brief for Petitioner 15; App. 149–153.

[5] Section 17(a), as set forth in 15 U. S. C. § 77q(a), provides:

"It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

"(1) to employ any device, scheme, or artifice to defraud, or

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to

Exchange Act of 1934, 48 Stat. 891, 15 U. S. C. § 78j(b),[6] and SEC Rule 10b–5, 17 CFR § 240.10b–5 (1983),[7] by repeating the allegations of fraud to members of the investment community who later sold their Equity Funding stock. The SEC concluded: "Where 'tippees'—regardless of their motivation or occupation—come into possession of material 'corporate information that they know is confidential and know or should know came from a corporate insider,' they must either publicly disclose that information or refrain from trading." 21 S. E. C. Docket 1401, 1407 (1981) (footnote omitted) (quoting *Chiarella* v. *United States*, 445 U. S. 222, 230, n. 12 (1980)). Recognizing, however, that Dirks "played an important role in bringing [Equity Funding's] massive fraud

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make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

[6] Section 10(b) provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

. . . . .

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

[7] Rule 10b–5 provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

"(a) To employ any device, scheme, or artifice to defraud,

"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

to light," 21 S. E. C. Docket, at 1412,[8] the SEC only censured him.[9]

Dirks sought review in the Court of Appeals for the District of Columbia Circuit. The court entered judgment against Dirks "for the reasons stated by the Commission in its opinion." App. to Pet. for Cert. C–2. Judge Wright, a member of the panel, subsequently issued an opinion. Judge Robb concurred in the result and Judge Tamm dissented; neither filed a separate opinion. Judge Wright believed that "the obligations of corporate fiduciaries pass to all those to whom they disclose their information before it has been disseminated to the public at large." 220 U. S. App. D. C. 309, 324, 681 F. 2d 824, 839 (1982). Alternatively, Judge Wright concluded that, as an employee of a broker-dealer, Dirks had violated "obligations to the SEC and to the public completely independent of any obligations he acquired" as a result of receiving the information. *Id.*, at 325, 681 F. 2d, at 840.

In view of the importance to the SEC and to the securities industry of the question presented by this case, we granted a writ of certiorari. 459 U. S. 1014 (1982). We now reverse.

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[8] JUSTICE BLACKMUN's dissenting opinion minimizes the role Dirks played in making public the Equity Funding fraud. See *post*, at 670 and 677, n. 15. The dissent would rewrite the history of Dirks' extensive investigative efforts. See, *e. g.*, 21 S. E. C. Docket, at 1412 ("It is clear that Dirks played an important role in bringing [Equity Funding's] massive fraud to light, and it is also true that he reported the fraud allegation to [Equity Funding's] auditors and sought to have the information published in the *Wall Street Journal*"); 220 U. S. App. D. C., at 314, 681 F. 2d, at 829 (Wright, J.) ("Largely thanks to Dirks one of the most infamous frauds in recent memory was uncovered and exposed, while the record shows that the SEC repeatedly missed opportunities to investigate Equity Funding").

[9] Section 15 of the Securities Exchange Act, 15 U. S. C. § 78*o*(b)(4)(E), provides that the SEC may impose certain sanctions, including censure, on any person associated with a registered broker-dealer who has "willfully aided [or] abetted" any violation of the federal securities laws. See 15 U. S. C. § 78ff(a) (1976 ed., Supp. V) (providing criminal penalties).

II

In the seminal case of *In re Cady, Roberts & Co.*, 40 S. E. C. 907 (1961), the SEC recognized that the common law in some jurisdictions imposes on "corporate 'insiders,' particularly officers, directors, or controlling stockholders" an "affirmative duty of disclosure . . . when dealing in securities." *Id.*, at 911, and n. 13.[10] The SEC found that not only did breach of this common-law duty also establish the elements of a Rule 10b–5 violation,[11] but that individuals other than corporate insiders could be obligated either to disclose material nonpublic information[12] before trading or to abstain from trading altogether. *Id.*, at 912. In *Chiarella*, we accepted the two elements set out in *Cady, Roberts* for establishing a Rule 10b–5 violation: "(i) the existence of a relationship affording access to inside information intended to be available only for a corporate purpose, and (ii) the unfairness of allowing a corporate insider to take advantage of that information by trading without disclosure." 445 U. S., at 227. In examining whether Chiarella had an obligation to disclose or abstain, the Court found that there is no general duty to disclose before trading on material nonpublic information,[13] and held that "a duty to disclose under § 10(b) does not arise from the mere possession of nonpublic market information." *Id.*, at 235. Such a duty arises rather from the existence of a fiduciary relationship. See *id.*, at 227–235.

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[10] The duty that insiders owe to the corporation's shareholders not to trade on inside information differs from the common-law duty that officers and directors also have to the corporation itself not to mismanage corporate assets, of which confidential information is one. See 3 W. Fletcher, Cyclopedia of the Law of Private Corporations §§ 848, 900 (rev. ed. 1975 and Supp. 1982); 3A *id.*, §§ 1168.1, 1168.2 (rev. ed. 1975). In holding that breaches of this duty to shareholders violated the Securities Exchange Act, the *Cady, Roberts* Commission recognized, and we agree, that "[a] significant purpose of the Exchange Act was to eliminate the idea that use of inside information for personal advantage was a normal emolument of corporate office." See 40 S. E. C., at 912, n. 15.

[11] Rule 10b–5 is generally the most inclusive of the three provisions on which the SEC rested its decision in this case, and we will refer to it when we note the statutory basis for the SEC's inside-trading rules.

[12] The SEC views the disclosure duty as requiring more than disclosure to purchasers or sellers: "Proper and adequate disclosure of significant corporate developments can only be effected by a public release through the appropriate public media, designed to achieve a broad dissemination to the investing public generally and without favoring any special person or group." *In re Faberge, Inc.*, 45 S. E. C. 249, 256 (1973).

Not "all breaches of fiduciary duty in connection with a securities transaction," however, come within the ambit of Rule 10b–5. *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 472 (1977). There must also be "manipulation or deception." *Id.*, at 473. In an inside-trading case this fraud derives from the "inherent unfairness involved where one takes advantage" of "information intended to be available only for a corporate purpose and not for the personal benefit of anyone." *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 43 S. E. C. 933, 936 (1968). Thus, an insider will be liable under Rule 10b–5 for inside trading only where he fails to disclose material nonpublic information before trading on it and thus makes "secret profits." *Cady, Roberts, supra*, at 916, n. 31.

III

We were explicit in *Chiarella* in saying that there can be no duty to disclose where the person who has traded on inside information "was not [the corporation's] agent, . . . was not a fiduciary, [or] was not a person in whom the sellers [of the securities] had placed their trust and confidence." 445 U. S., at 232. Not to require such a fiduciary relationship, we recognized, would "depar[t] radically from the established doctrine that duty arises from a specific relationship between two parties" and would amount to "recognizing a general duty between all participants in market transactions to forgo actions based on material, nonpublic information." *Id.*, at 232, 233. This requirement of a specific relationship between the shareholders and the individual trading on inside information has created analytical difficulties for the SEC and courts in policing tippees who trade on inside information. Unlike insiders who have independent fiduciary duties to both the corporation and its shareholders, the typical tippee has no such relationships.[14] In view of this absence, it has been unclear how a tippee acquires the *Cady, Roberts* duty to refrain from trading on inside information.

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[13] See 445 U. S., at 233; *id.*, at 237 (STEVENS, J., concurring); *id.*, at 238–239 (BRENNAN, J., concurring in judgment); *id.*, at 239–240 (BURGER, C. J., dissenting). Cf. *id.*, at 252, n. 2 (BLACKMUN, J., dissenting) (recognizing that there is no obligation to disclose material nonpublic information obtained through the exercise of "diligence or acumen" and "honest means," as opposed to "stealth").

A

The SEC's position, as stated in its opinion in this case, is that a tippee "inherits" the *Cady, Roberts* obligation to shareholders whenever he receives inside information from an insider:

> "In tipping potential traders, Dirks breached a duty which he had assumed as a result of knowingly receiving

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[14] Under certain circumstances, such as where corporate information is revealed legitimately to an underwriter, accountant, lawyer, or consultant working for the corporation, these outsiders may become fiduciaries of the shareholders. The basis for recognizing this fiduciary duty is not simply that such persons acquired nonpublic corporate information, but rather that they have entered into a special confidential relationship in the conduct of the business of the enterprise and are given access to information solely for corporate purposes. See *SEC* v. *Monarch Fund*, 608 F. 2d 938, 942 (CA2 1979); *In re Investors Management Co.*, 44 S. E. C. 633, 645 (1971); *In re Van Alstyne, Noel & Co.*, 43 S. E. C. 1080, 1084–1085 (1969); *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 43 S. E. C. 933, 937 (1968); *Cady, Roberts*, 40 S. E. C., at 912. When such a person breaches his fiduciary relationship, he may be treated more properly as a tipper than a tippee. See *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F. 2d 228, 237 (CA2 1974) (investment banker had access to material information when working on a proposed public offering for the corporation). For such a duty to be imposed, however, the corporation must expect the outsider to keep the disclosed nonpublic information confidential, and the relationship at least must imply such a duty.

> confidential information from [Equity Funding] insiders. Tippees such as Dirks who receive non-public, material information from insiders become 'subject to the same duty as [the] insiders.' *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* [495 F. 2d 228, 237 (CA2 1974) (quoting *Ross* v. *Licht*, 263 F. Supp. 395, 410 (SDNY 1967))]. Such a tippee breaches the fiduciary duty which he assumes from the insider when the tippee knowingly transmits the information to someone who will probably trade on the basis thereof. . . . Presumably, Dirks' informants were entitled to disclose the [Equity Funding] fraud in order to bring it to light and its perpetrators to justice. However, Dirks—standing in their shoes—committed a breach of the fiduciary duty which he had assumed in dealing with them, when he passed the information on to traders." 21 S. E. C. Docket, at 1410, n. 42.

This view differs little from the view that we rejected as inconsistent with congressional intent in *Chiarella*. In that case, the Court of Appeals agreed with the SEC and affirmed Chiarella's conviction, holding that "*[a]nyone*—corporate insider or not—who regularly receives material nonpublic information may not use that information to trade in securities without incurring an affirmative duty to disclose." *United States* v. *Chiarella*, 588 F. 2d 1358, 1365 (CA2 1978) (emphasis in original). Here, the SEC maintains that anyone who knowingly receives nonpublic material information from an insider has a fiduciary duty to disclose before trading.[15]

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[15] Apparently, the SEC believes this case differs from *Chiarella* in that Dirks' receipt of inside information from Secrist, an insider, carried Secrist's duties with it, while Chiarella received the information without the direct involvement of an insider and thus inherited no duty to disclose or abstain. The SEC fails to explain, however, why the receipt of nonpublic information from an insider automatically carries with it the fiduciary duty of the insider. As we emphasized in *Chiarella*, mere possession of nonpublic information does not give rise to a duty to disclose or abstain; only a specific relationship does that. And we do not believe that the mere

In effect, the SEC's theory of tippee liability in both cases appears rooted in the idea that the antifraud provisions require equal information among all traders. This conflicts with the principle set forth in *Chiarella* that only some persons, under some circumstances, will be barred from trading while in possession of material nonpublic information.[16] Judge Wright correctly read our opinion in *Chiarella* as repudiating any notion that all traders must enjoy equal information before trading: "[T]he 'information' theory is rejected. Because the disclose-or-refrain duty is extraordinary, it attaches only when a party has legal obligations other than a mere duty to comply with the general antifraud proscriptions in the federal securities laws." 220 U. S. App. D. C., at 322, 681 F. 2d, at 837. See *Chiarella*, 445 U. S., at 235, n. 20. We reaffirm today that "[a] duty [to disclose]

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receipt of information from an insider creates such a special relationship between the tippee and the corporation's shareholders.

Apparently recognizing the weakness of its argument in light of *Chiarella*, the SEC attempts to distinguish that case factually as involving not "inside" information, but rather "market" information, *i. e.*, "information originating outside the company and usually about the supply and demand for the company's securities." Brief for Respondent 22. This Court drew no such distinction in *Chiarella* and, as THE CHIEF JUSTICE noted, "[i]t is clear that § 10(b) and Rule 10b–5 by their terms and by their history make no such distinction." 445 U. S., at 241, n. 1 (dissenting opinion). See ALI, Federal Securities Code § 1603, Comment (2)(j) (Prop. Off. Draft 1978).

[16] In *Chiarella*, we noted that formulation of an absolute equal information rule "should not be undertaken absent some explicit evidence of congressional intent." 445 U. S., at 233. Rather than adopting such a radical view of securities trading, Congress has expressly exempted many market professionals from the general statutory prohibition set forth in § 11(a)(1) of the Securities Exchange Act, 15 U. S. C. § 78k(a)(1), against members of a national securities exchange trading for their own account. See *id.*, at 233, n. 16. We observed in *Chiarella* that "[t]he exception is based upon Congress' recognition that [market professionals] contribute to a fair and orderly marketplace at the same time they exploit the informational advantage that comes from their possession of [nonpublic information]." *Ibid.*

arises from the relationship between parties . . . and not merely from one's ability to acquire information because of his position in the market." *Id.*, at 231–232, n. 14.

Imposing a duty to disclose or abstain solely because a person knowingly receives material nonpublic information from an insider and trades on it could have an inhibiting influence on the role of market analysts, which the SEC itself recognizes is necessary to the preservation of a healthy market.[17] It is commonplace for analysts to "ferret out and analyze information," 21 S. E. C. Docket, at 1406,[18] and this often is done by meeting with and questioning corporate officers and others who are insiders. And information that the analysts obtain normally may be the basis for judgments as to the market worth of a corporation's securities. The analyst's judgment in this respect is made available in market letters or otherwise to clients of the firm. It is the nature of this type of information, and indeed of the markets themselves, that such information cannot be made simultaneously available to all of the corporation's stockholders or the public generally.

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[17] The SEC expressly recognized that "[t]he value to the entire market of [analysts'] efforts cannot be gainsaid; market efficiency in pricing is significantly enhanced by [their] initiatives to ferret out and analyze information, and thus the analyst's work redounds to the benefit of all investors." 21 S. E. C. Docket, at 1406. The SEC asserts that analysts remain free to obtain from management corporate information for purposes of "filling in the 'interstices in analysis'. . . ." Brief for Respondent 42 (quoting *Investors Management Co.*, 44 S. E. C., at 646). But this rule is inherently imprecise, and imprecision prevents parties from ordering their actions in accord with legal requirements. Unless the parties have some guidance as to where the line is between permissible and impermissible disclosures and uses, neither corporate insiders nor analysts can be sure when the line is crossed. Cf. *Adler* v. *Klawans*, 267 F. 2d 840, 845 (CA2 1959) (Burger, J., sitting by designation).

[18] On its facts, this case is the unusual one. Dirks is an analyst in a broker-dealer firm, and he did interview management in the course of his investigation. He uncovered, however, startling information that required no analysis or exercise of judgment as to its market relevance. Nonetheless, the principle at issue here extends beyond these facts. The SEC's rule—applicable without regard to any breach by an insider—could have serious ramifications on reporting by analysts of investment views.

Despite the unusualness of Dirks' "find," the central role that he played in uncovering the fraud at Equity Funding, and that analysts in general can play in revealing information that corporations may have reason to withhold from the public, is an important one. Dirks' careful investigation brought to light a massive fraud at the corporation. And until the Equity Funding fraud was exposed, the information in the trading market was grossly inaccurate. But for Dirks' efforts, the fraud might well have gone undetected longer. See n. 8, *supra*.

B

The conclusion that recipients of inside information do not invariably acquire a duty to disclose or abstain does not mean that such tippees always are free to trade on the information. The need for a ban on some tippee trading is clear. Not only are insiders forbidden by their fiduciary relationship from personally using undisclosed corporate information to their advantage, but they also may not give such information to an outsider for the same improper purpose of exploiting the information for their personal gain. See 15 U. S. C. § 78t(b) (making it unlawful to do indirectly "by means of any other person" any act made unlawful by the federal securities laws). Similarly, the transactions of those who knowingly participate with the fiduciary in such a breach are "as forbidden" as transactions "on behalf of the trustee himself." *Mosser* v. *Darrow*, 341 U. S. 267, 272 (1951). See *Jackson* v. *Smith*, 254 U. S. 586, 589 (1921); *Jackson* v. *Ludeling*, 21 Wall. 616, 631–632 (1874). As the Court explained in *Mosser*, a contrary rule "would open up opportunities for devious dealings in the name of others that the trustee could not conduct in his own." 341 U. S., at 271. See *SEC* v. *Texas Gulf Sulphur Co.*, 446 F. 2d 1301, 1308 (CA2), cert. denied, 404 U. S. 1005 (1971). Thus, the tippee's duty to disclose or abstain is derivative from that of the insider's duty. See Tr. of Oral Arg. 38. Cf. *Chiarella*, 445 U. S., at 246, n. 1 (BLACKMUN, J., dissenting). As we noted in *Chiarella*, "[t]he tippee's obligation has been viewed as arising from his role as a participant after the fact in the insider's breach of a fiduciary duty." *Id.*, at 230, n. 12.

Thus, some tippees must assume an insider's duty to the shareholders not because they receive inside information, but rather because it has been made available to them *improperly*.[19] And for Rule 10b–5 purposes, the insider's disclosure is improper only where it would violate his *Cady, Roberts* duty. Thus, a tippee assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach.[20] As Commissioner Smith perceptively observed in *In re Investors Management Co.*, 44 S. E. C. 633 (1971): "[T]ippee responsibility must be related back to insider responsibility by a necessary finding that the tippee knew the information was given to him in breach of a duty by a person having a special relationship to the issuer not to disclose the information . . . ." *Id.*, at 651 (concurring in result). Tipping thus properly is viewed only as a means of indirectly violating the *Cady, Roberts* disclose-or-abstain rule.[21]

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[19] The SEC itself has recognized that tippee liability properly is imposed only in circumstances where the tippee knows, or has reason to know, that the insider has disclosed improperly inside corporate information. In *Investors Management Co., supra*, the SEC stated that one element of tippee liability is that the tippee knew or had reason to know that the information "was non-public and had been obtained *improperly* by selective revelation or otherwise." 44 S. E. C., at 641 (emphasis added). Commissioner Smith read this test to mean that a tippee can be held liable only if he received information in breach of an insider's duty not to disclose it. *Id.*, at 650 (concurring in result).

[20] Professor Loss has linked tippee liability to the concept in the law of restitution that " '[w]here a fiduciary in violation of his duty to the beneficiary communicates confidential information to a third person, the third person, if he had notice of the violation of duty, holds upon a constructive trust for the beneficiary any profit which he makes through the use of such information.' " 3 L. Loss, Securities Regulation 1451 (2d ed. 1961) (quoting Restatement of Restitution § 201(2) (1937)). Other authorities likewise have expressed the view that tippee liability exists only where there has been a breach of trust by an insider of which the tippee had knowledge. See, *e. g.*, *Ross* v. *Licht*, 263 F. Supp. 395, 410 (SDNY 1967); A. Jacobs, The Impact of Rule 10b–5, § 167, p. 7–4 (rev. ed. 1980) ("[T]he better view is that a tipper must know or have reason to know the information is nonpublic and was improperly obtained"); Fleischer, Mundheim, & Murphy, An Initial Inquiry Into the Responsibility to Disclose Market Information, 121 U. Pa. L. Rev. 798, 818, n. 76 (1973) ("The extension of rule 10b–5 restrictions to tippees of corporate insiders can best be justified on the theory that they are participating in the insider's breach of his fiduciary duty"). Cf. Restatement (Second) of Agency § 312, Comment *c* (1958) ("A person who, with notice that an agent is thereby violating his duty

C

In determining whether a tippee is under an obligation to disclose or abstain, it thus is necessary to determine whether the insider's "tip" constituted a breach of the insider's fiduciary duty. All disclosures of confidential corporate informa-

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to his principal, receives confidential information from the agent, may be [deemed] . . . a constructive trustee").

[21] We do not suggest that knowingly trading on inside information is ever "socially desirable or even that it is devoid of moral considerations." Dooley, Enforcement of Insider Trading Restrictions, 66 Va. L. Rev. 1, 55 (1980). Nor do we imply an absence of responsibility to disclose promptly indications of illegal actions by a corporation to the proper authorities—typically the SEC and exchange authorities in cases involving securities. Depending on the circumstances, and even where permitted by law, one's trading on material nonpublic information is behavior that may fall below ethical standards of conduct. But in a statutory area of the law such as securities regulation, where legal principles of general application must be applied, there may be "significant distinctions between actual legal obligations and ethical ideals." SEC, Report of Special Study of Securities Markets, H. R. Doc. No. 95, 88th Cong., 1st Sess., pt. 1, pp. 237–238 (1963). The SEC recognizes this. At oral argument, the following exchange took place:

"QUESTION: So, it would not have satisfied his obligation under the law to go to the SEC first?

"[SEC's counsel]: That is correct. That an insider has to observe what has come to be known as the abstain or disclosure rule. Either the information has to be disclosed to the market if it is inside information . . . or the insider must abstain." Tr. of Oral Arg. 27.

Thus, it is clear that Rule 10b–5 does not impose any obligation simply to tell the SEC about the fraud before trading.

tion are not inconsistent with the duty insiders owe to shareholders. In contrast to the extraordinary facts of this case, the more typical situation in which there will be a question whether disclosure violates the insider's *Cady, Roberts* duty is when insiders disclose information to analysts. See n. 16, *supra*. In some situations, the insider will act consistently with his fiduciary duty to shareholders, and yet release of the information may affect the market. For example, it may not be clear—either to the corporate insider or to the recipient analyst—whether the information will be viewed as material nonpublic information. Corporate officials may mistakenly think the information already has been disclosed or that it is not material enough to affect the market. Whether disclosure is a breach of duty therefore depends in large part on the purpose of the disclosure. This standard was identified by the SEC itself in *Cady, Roberts:* a purpose of the securities laws was to eliminate "use of inside information for personal advantage." 40 S. E. C., at 912, n. 15. See n. 10, *supra*. Thus, the test is whether the insider personally will benefit, directly or indirectly, from his disclosure. Absent some personal gain, there has been no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach.[22] As Commissioner Smith stated in *Investors Management Co.:* "It is important in this type of case to focus on policing insiders and what they do . . . rather than on policing information *per se* and its possession. . . ." 44 S. E. C., at 648 (concurring in result).

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[22] An example of a case turning on the court's determination that the disclosure did not impose any fiduciary duties on the recipient of the inside information is *Walton* v. *Morgan Stanley & Co.*, 623 F. 2d 796 (CA2 1980). There, the defendant investment banking firm, representing one of its own corporate clients, investigated another corporation that was a possible target of a takeover bid by its client. In the course of negotiations the investment banking firm was given, on a confidential basis, unpublished material information. Subsequently, after the proposed takeover was abandoned, the firm was charged with relying on the information when it traded in the target corporation's stock. For purposes of the decision, it was assumed that the firm knew the information was confidential, but that it had been received in arm's-length negotiations. See *id.*, at 798. In the absence of any fiduciary relationship, the Court of Appeals found no basis for imposing tippee liability on the investment firm. See *id.*, at 799.

The SEC argues that, if inside-trading liability does not exist when the information is transmitted for a proper purpose but is used for trading, it would be a rare situation when the parties could not fabricate some ostensibly legitimate business justification for transmitting the information. We think the SEC is unduly concerned. In determining whether the insider's purpose in making a particular disclosure is fraudulent, the SEC and the courts are not required to read the parties' minds. Scienter in some cases is relevant in determining whether the tipper has violated his *Cady, Roberts* duty.[23] But to determine whether the disclosure itself "deceive[s], manipulate[s], or defraud[s]" shareholders, *Aaron* v. *SEC*, 446 U. S. 680, 686 (1980), the initial inquiry is whether there has been a breach of duty by the insider. This requires courts to focus on objective criteria, *i. e.*, whether the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings. Cf. 40 S. E. C., at 912, n. 15; Brudney, Insiders, Outsiders, and Informational Advantages Under the Federal Securities

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[23] Scienter—"a mental state embracing intent to deceive, manipulate, or defraud," *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 193–194, n. 12 (1976)—is an independent element of a Rule 10b–5 violation. See *Aaron* v. *SEC*, 446 U. S. 680, 695 (1980). Contrary to the dissent's suggestion, see *post*, at 674, n. 10, motivation is not irrelevant to the issue of scienter. It is not enough that an insider's conduct results in harm to investors; rather, a violation may be found only where there is "intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." *Ernst & Ernst* v. *Hochfelder*, *supra*, at 199. The issue in this case, however, is not whether Secrist or Dirks acted with scienter, but rather whether there was any deceptive or fraudulent conduct at all, *i. e.*, whether Secrist's disclosure constituted a breach of his fiduciary duty and thereby caused injury to shareholders. See n. 27, *infra*. Only if there was such a breach did Dirks, a tippee, acquire a fiduciary duty to disclose or abstain.

Laws, 93 Harv. L. Rev. 322, 348 (1979) ("The theory . . . is that the insider, by giving the information out selectively, is in effect selling the information to its recipient for cash, reciprocal information, or other things of value for himself . . ."). There are objective facts and circumstances that often justify such an inference. For example, there may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient. The elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend. The tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient.

Determining whether an insider personally benefits from a particular disclosure, a question of fact, will not always be easy for courts. But it is essential, we think, to have a guiding principle for those whose daily activities must be limited and instructed by the SEC's inside-trading rules, and we believe that there must be a breach of the insider's fiduciary duty before the tippee inherits the duty to disclose or abstain. In contrast, the rule adopted by the SEC in this case would have no limiting principle.[24]

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[24] Without legal limitations, market participants are forced to rely on the reasonableness of the SEC's litigation strategy, but that can be hazardous, as the facts of this case make plain. Following the SEC's filing of the *Texas Gulf Sulphur* action, Commissioner (and later Chairman) Budge spoke of the various implications of applying Rule 10b–5 in inside-trading cases:

"Turning to the realm of possible defendants in the present and potential civil actions, the Commission certainly does not contemplate suing every person who may have come across inside information. In the Texas Gulf action neither tippees nor persons in the vast rank and file of employees have been named as defendants. In my view, the Commission in future cases normally should not join rank and file employees or persons outside the company *such as an analyst or reporter* who learns of inside information." Speech of Hamer Budge to the New York Regional Group of the

IV

Under the inside-trading and tipping rules set forth above, we find that there was no actionable violation by Dirks.[25] It is undisputed that Dirks himself was a stranger to Equity Funding, with no pre-existing fiduciary duty to its shareholders.[26] He took no action, directly or indirectly, that induced the shareholders or officers of Equity Funding to repose trust or confidence in him. There was no expectation by Dirks' sources that he would keep their information in confidence. Nor did Dirks misappropriate or illegally obtain the information about Equity Funding. Unless the insiders breached their *Cady, Roberts* duty to shareholders in disclosing the nonpublic information to Dirks, he breached no duty when he passed it on to investors as well as to the Wall Street Journal.

American Society of Corporate Secretaries, Inc. (Nov. 18, 1965), reprinted in The Texas Gulf Sulphur Case—What It Is and What It Isn't, The Corporate Secretary, No. 127, p. 6 (Dec. 17, 1965) (emphasis added).

[25] Dirks contends that he was not a "tippee" because the information he received constituted unverified allegations of fraud that were denied by management and were not "material facts" under the securities laws that required disclosure before trading. He also argues that the information he received was not truly "inside" information, *i. e.*, intended for a confidential corporate purpose, but was merely evidence of a crime. The Solicitor General agrees. See Brief for United States as *Amicus Curiae* 22. We need not decide, however, whether the information constituted "material facts," or whether information concerning corporate crime is properly characterized as "inside information." For purposes of deciding this case, we assume the correctness of the SEC's findings, accepted by the Court of Appeals, that petitioner was a tippee of material inside information.

[26] Judge Wright found that Dirks acquired a fiduciary duty by virtue of his position as an employee of a broker-dealer. See 220 U. S. App. D. C., at 325–327, 681 F. 2d, at 840–842. The SEC, however, did not consider Judge Wright's novel theory in its decision, nor did it present that theory to the Court of Appeals. The SEC also has not argued Judge Wright's theory in this Court. See Brief for Respondent 21, n. 27. The merits of such a duty are therefore not before the Court. See *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196–197 (1947).

It is clear that neither Secrist nor the other Equity Funding employees violated their *Cady, Roberts* duty to the corporation's shareholders by providing information to Dirks.[27]

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[27] In this Court, the SEC appears to contend that an insider invariably violates a fiduciary duty to the corporation's shareholders by transmitting nonpublic corporate information to an outsider when he has reason to believe that the outsider may use it to the disadvantage of the shareholders. "Thus, regardless of any ultimate motive to bring to public attention the derelictions at Equity Funding, Secrist breached his duty to Equity Funding shareholders." Brief for Respondent 31. This perceived "duty" differs markedly from the one that the SEC identified in *Cady, Roberts* and that has been the basis for federal tippee-trading rules to date. In fact, the SEC did not charge Secrist with any wrongdoing, and we do not understand the SEC to have relied on any theory of a breach of duty by Secrist in finding that Dirks breached his duty to Equity Funding's shareholders. See App. 250 (decision of Administrative Law Judge) ("One who knows himself to be a beneficiary of non-public, selectively disclosed inside information must fully disclose or refrain from trading"); Record, SEC's Reply to Notice of Supplemental Authority before the SEC 4 ("If Secrist was acting properly, Dirks inherited a duty to [Equity Funding]'s shareholders to refrain from improper private use of the information"); Brief for SEC in No. 81-1243 (CADC), pp. 47-50; *id.*, at 51 ("[K]nowing possession of inside information by any person imposes a duty to abstain or disclose"); *id.*, at 52-54; *id.*, at 55 ("[T]his obligation arises not from the manner in which such information is acquired . . ."); 220 U. S. App. D. C., at 322-323, 681 F. 2d, at 837-838 (Wright, J.).

The dissent argues that "Secrist violated his duty to Equity Funding shareholders by transmitting material nonpublic information to Dirks with the intention that Dirks would cause his clients to trade on that information." *Post*, at 678-679. By perceiving a breach of fiduciary duty whenever inside information is intentionally disclosed to securities traders, the dissenting opinion effectively would achieve the same result as the SEC's theory below, *i. e.*, mere possession of inside information while trading would be viewed as a Rule 10b-5 violation. But *Chiarella* made it explicitly clear that there is no general duty to forgo market transactions "based on material, nonpublic information." 445 U. S., at 233. Such a duty would "depar[t] radically from the established doctrine that duty arises from a specific relationship between two parties." *Ibid.* See *supra*, at 654-655.

Moreover, to constitute a violation of Rule 10b-5, there must be fraud. See *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 199 (statutory words "manipulative," "device," and "contrivance . . . connot[e] intentional or willful conduct designed to *deceive or defraud* investors by controlling or

The tippers received no monetary or personal benefit for revealing Equity Funding's secrets, nor was their purpose to make a gift of valuable information to Dirks. As the facts of this case clearly indicate, the tippers were motivated by a desire to expose the fraud. See *supra*, at 648–649. In the absence of a breach of duty to shareholders by the insiders, there was no derivative breach by Dirks. See n. 20, *supra*. Dirks therefore could not have been "a participant after the fact in [an] insider's breach of a fiduciary duty." *Chiarella*, 445 U. S., at 230, n. 12.

V

We conclude that Dirks, in the circumstances of this case, had no duty to abstain from use of the inside information that he obtained. The judgment of the Court of Appeals therefore is

Reversed.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The Court today takes still another step to limit the protections provided investors by § 10(b) of the Securities Ex-

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artificially affecting the price of securities") (emphasis added). There is no evidence that Secrist's disclosure was intended to or did in fact "deceive or defraud" anyone. Secrist certainly intended to convey relevant information that management was unlawfully concealing, and—so far as the record shows—he believed that persuading Dirks to investigate was the best way to disclose the fraud. Other efforts had proved fruitless. Under any objective standard, Secrist received no direct or indirect personal benefit from the disclosure.

The dissenting opinion focuses on shareholder "losses," "injury," and "damages," but in many cases there may be no clear causal connection between inside trading and outsiders' losses. In one sense, as market values fluctuate and investors act on inevitably incomplete or incorrect information, there always are winners and losers; but those who have "lost" have not necessarily been defrauded. On the other hand, inside trading for personal gain is fraudulent, and is a violation of the federal securities laws. See Dooley, *supra* n. 21, at 39–41, 70. Thus, there is little legal significance to the dissent's argument that Secrist and Dirks created new "victims" by disclosing the information to persons who traded. In fact, they prevented the fraud from continuing and victimizing many more investors.

change Act of 1934.[1] See *Chiarella* v. *United States*, 445 U. S. 222, 246 (1980) (dissenting opinion). The device employed in this case engrafts a special motivational requirement on the fiduciary duty doctrine. This innovation excuses a knowing and intentional violation of an insider's duty to shareholders if the insider does not act from a motive of personal gain. Even on the extraordinary facts of this case, such an innovation is not justified.

I

As the Court recognizes, *ante*, at 658, n. 18, the facts here are unusual. After a meeting with Ronald Secrist, a former Equity Funding employee, on March 7, 1973, App. 226, petitioner Raymond Dirks found himself in possession of material nonpublic information of massive fraud within the company.[2] In the Court's words, "[h]e uncovered . . . startling information that required no analysis or exercise of judgment as to its market relevance." *Ibid.* In disclosing that information to Dirks, Secrist intended that Dirks would disseminate the information to his clients, those clients would unload their Equity Funding securities on the market, and the price would fall precipitously, thereby triggering a reaction from the authorities. App. 16, 25, 27.

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[1] See, *e. g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975); *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185 (1976); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1 (1977); *Chiarella* v. *United States*, 445 U. S. 222 (1980); *Aaron* v. *SEC*, 446 U. S. 680 (1980). This trend frustrates the congressional intent that the securities laws be interpreted flexibly to protect investors, see *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 151 (1972); *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 186 (1963), and to regulate deceptive practices "detrimental to the interests of the investor," S. Rep. No. 792, 73d Cong., 2d Sess., 18 (1934); see H. R. Rep. No. 1383, 73d Cong., 2d Sess., 10 (1934). Moreover, the Court continues to refuse to accord to SEC administrative decisions the deference it normally gives to an agency's interpretation of its own statute. See, *e. g.*, *Blum* v. *Bacon*, 457 U. S. 132 (1982).

[2] Unknown to Dirks, Secrist also told his story to New York insurance regulators the same day. App. 23. They immediately assured themselves that Equity Funding's New York subsidiary had sufficient assets to cover its outstanding policies and then passed on the information to California regulators who in turn informed Illinois regulators. Illinois investigators, later joined by California officials, conducted a surprise audit of Equity Funding's Illinois subsidiary, *id.*, at 87–88, to find $22 million of the subsidiary's assets missing. On March 30, these authorities seized control of the Illinois subsidiary. *Id.*, at 271.

Dirks complied with his informant's wishes. Instead of reporting that information to the Securities and Exchange Commission (SEC or Commission) or to other regulatory agencies, Dirks began to disseminate the information to his clients and undertook his own investigation.[3] One of his first steps was to direct his associates at Delafield Childs to draw up a list of Delafield clients holding Equity Funding securities. On March 12, eight days before Dirks flew to Los Angeles to investigate Secrist's story, he reported the full allegations to Boston Company Institutional Investors, Inc., which on March 15 and 16 sold approximately $1.2 million of Equity securities.[4] See *id.*, at 199. As he gathered more information, he selectively disclosed it to his clients. To those holding Equity Funding securities he gave the "hard" story—all the allegations; others received the "soft" story—a recitation of vague factors that might reflect adversely on Equity Funding's management. See *id.*, at 211, n. 24.

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[3] In the same administrative proceeding at issue here, the Administrative Law Judge (ALJ) found that Dirks' clients—five institutional investment advisers—violated § 17(a) of the Securities Act of 1933, 15 U. S. C. § 77q(a), § 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j(b), and Rule 10b-5, 17 CFR § 240.10b-5 (1983), by trading on Dirks' tips. App. 297. All the clients were censured, except Dreyfus Corporation. The ALJ found that Dreyfus had made significant efforts to disclose the information to Goldman, Sachs, the purchaser of its securities. *Id.*, at 299, 301. None of Dirks' clients appealed these determinations. App. to Pet. for Cert. B-2, n. 1.

[4] The Court's implicit suggestion that Dirks did not gain by this selective dissemination of advice, *ante*, at 649, n. 2, is inaccurate. The ALJ found that because of Dirks' information, Boston Company Institutional Investors, Inc., directed business to Delafield Childs that generated approximately $25,000 in commissions. App. 199, 204-205. While it is true that the exact economic benefit gained by Delafield Childs due to Dirks' activities is unknowable because of the structure of compensation in the securities market, there can be no doubt that Delafield and Dirks gained both monetary rewards and enhanced reputations for "looking after" their clients.

Dirks' attempts to disseminate the information to non-clients were feeble, at best. On March 12, he left a message for Herbert Lawson, the San Francisco bureau chief of The Wall Street Journal. Not until March 19 and 20 did he call Lawson again, and outline the situation. William Blundell, a Journal investigative reporter based in Los Angeles, got in touch with Dirks about his March 20 telephone call. On March 21, Dirks met with Blundell in Los Angeles. Blundell began his own investigation, relying in part on Dirks' contacts, and on March 23 telephoned Stanley Sporkin, the SEC's Deputy Director of Enforcement. On March 26, the next business day, Sporkin and his staff interviewed Blundell and asked to see Dirks the following morning. Trading was halted by the New York Stock Exchange at about the same time Dirks was talking to Los Angeles SEC personnel. The next day, March 28, the SEC suspended trading in Equity Funding securities. By that time, Dirks' clients had unloaded close to $15 million of Equity Funding stock and the price had plummeted from $26 to $15. The effect of Dirks' selective dissemination of Secrist's information was that Dirks' clients were able to shift the losses that were inevitable due to the Equity Funding fraud from themselves to uninformed market participants.

II

A

No one questions that Secrist himself could not trade on his inside information to the disadvantage of uninformed shareholders and purchasers of Equity Funding securities. See Brief for United States as *Amicus Curiae* 19, n. 12. Unlike the printer in *Chiarella*, Secrist stood in a fiduciary relationship with these shareholders. As the Court states, *ante*, at 653, corporate insiders have an affirmative duty of disclosure when trading with shareholders of the corporation. See *Chiarella*, 445 U. S., at 227. This duty extends as well to purchasers of the corporation's securities. *Id.*, at 227, n. 8, citing *Gratz* v. *Claughton*, 187 F. 2d 46, 49 (CA2), cert. denied, 341 U. S. 920 (1951).

The Court also acknowledges that Secrist could not do by proxy what he was prohibited from doing personally. *Ante*, at 659; *Mosser* v. *Darrow*, 341 U. S. 267, 272 (1951). But this is precisely what Secrist did. Secrist used Dirks to disseminate information to Dirks' clients, who in turn dumped stock on unknowing purchasers. Secrist thus intended Dirks to injure the purchasers of Equity Funding securities to whom Secrist had a duty to disclose. Accepting the Court's view of tippee liability,[5] it appears that Dirks' knowledge of this breach makes him liable as a participant in the breach after the fact. *Ante*, at 659, 667; *Chiarella*, 445 U. S., at 230, n. 12.

B

The Court holds, however, that Dirks is not liable because Secrist did not violate his duty; according to the Court, this is so because Secrist did not have the improper purpose of personal gain. *Ante*, at 662–663, 666–667. In so doing, the Court imposes a new, subjective limitation on the scope of the duty owed by insiders to shareholders. The novelty of this limitation is reflected in the Court's lack of support for it.[6]

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[5] I interpret the Court's opinion to impose liability on tippees like Dirks when the tippee knows or has reason to know that the information is material and nonpublic and was obtained through a breach of duty by selective revelation or otherwise. See *In re Investors Management Co.*, 44 S. E. C. 633, 641 (1971).

[6] The Court cites only a footnote in an SEC decision and Professor Brudney to support its rule. *Ante*, at 663–664. The footnote, however, merely identifies one result the securities laws are intended to prevent. It does not define the nature of the duty itself. See n. 9, *infra*. Professor Brudney's quoted statement appears in the context of his assertion that the

The insider's duty is owed directly to the corporation's shareholders.[7] See Langevoort, Insider Trading and the Fiduciary Principle: A Post-*Chiarella* Restatement, 70 Calif. L. Rev. 1, 5 (1982); 3A W. Fletcher, Cyclopedia of the Law of Private Corporations § 1168.2, pp. 288–289 (rev. ed. 1975). As *Chiarella* recognized, it is based on the relationship of trust and confidence between the insider and the shareholder. 445 U. S., at 228. That relationship assures the shareholder that the insider may not take actions that will harm him unfairly.[8] The affirmative duty of disclosure pro-

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duty of insiders to disclose prior to trading with shareholders is in large part a mechanism to correct the information available to noninsiders. Professor Brudney simply recognizes that the most common motive for breaching this duty is personal gain; he does not state, however, that the duty prevents only personal aggrandizement. Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws, 93 Harv. L. Rev. 322, 345–348 (1979). Surely, the Court does not now adopt Professor Brudney's access-to-information theory, a close cousin to the equality-of-information theory it accuses the SEC of harboring. See *ante*, at 655–658.

[7] The Court correctly distinguishes this duty from the duty of an insider to the corporation not to mismanage corporate affairs or to misappropriate corporate assets. *Ante*, at 653, n. 10. That duty also can be breached when the insider trades in corporate securities on the basis of inside information. Although a shareholder suing in the name of the corporation can recover for the corporation damages for any injury the insider causes by the breach of this distinct duty, *Diamond* v. *Oreamuno*, 24 N. Y. 2d 494, 498, 248 N. E. 2d 910, 912 (1969); see *Thomas* v. *Roblin Industries, Inc.*, 520 F. 2d 1393, 1397 (CA3 1975), insider trading generally does not injure the corporation itself. See Langevoort, Insider Trading and the Fiduciary Principle: A Post-*Chiarella* Restatement, 70 Calif. L. Rev. 1, 2, n. 5, 28, n. 111 (1982).

[8] As it did in *Chiarella*, 445 U. S., at 226–229, the Court adopts the *Cady, Roberts* formulation of the duty. *Ante*, at 653–654.

"Analytically, the obligation rests on two principal elements; first, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailtects against this injury. See *Pepper* v. *Litton*, 308 U. S. 295, 307, n. 15 (1939); *Strong* v. *Repide*, 213 U. S. 419, 431–434 (1909); see also *Chiarella*, 445 U. S., at 228, n. 10; cf. *Pepper*, 308 U. S., at 307 (fiduciary obligation to corporation exists for corporation's protection).

C

The fact that the insider himself does not benefit from the breach does not eradicate the shareholder's injury.[9] Cf. Restatement (Second) of Trusts § 205, Comments *c* and *d* (1959) (trustee liable for acts causing diminution of value of trust); 3

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able to those with whom he is dealing." *In re Cady, Roberts & Co.*, 40 S. E. C. 907, 912 (1961) (footnote omitted).

The first element—on which *Chiarella*'s holding rests—establishes the type of relationship that must exist between the parties before a duty to disclose is present. The second—not addressed by *Chiarella*—identifies the harm that the duty protects against: the inherent unfairness to the shareholder caused when an insider trades with him on the basis of undisclosed inside information.

[9] Without doubt, breaches of the insider's duty occur most often when an insider seeks personal aggrandizement at the expense of shareholders. Because of this, descriptions of the duty to disclose are often coupled with statements that the duty prevents unjust enrichment. See, *e. g.*, *In re Cady, Roberts & Co.*, 40 S. E. C., at 912, n. 15; Langevoort, 70 Calif. L. Rev., at 19. Private gain is certainly a strong motivation for breaching the duty.

It is, however, not an element of the breach of this duty. The reference to personal gain in *Cady, Roberts* for example, is appended to the first element underlying the duty which requires that an insider have a special relationship to corporate information that he cannot appropriate for his own benefit. See n. 8, *supra*. It does not limit the second element which addresses the injury to the shareholder and is at issue here. See *ibid*. In fact, *Cady, Roberts* describes the duty more precisely in a later footnote: "In the circumstances, [the insider's] relationship to his customers was such that he would have a duty not to take a position adverse to them, not to take secret profits at their expense, not to misrepresent facts to them, and in general to place their interests ahead of his own." 40 S. E. C., at 916, n. 31. This statement makes clear that enrichment of the insider himself is simply one of the results the duty attempts to prevent.

A. Scott, Law of Trusts § 205, p. 1665 (3d ed. 1967) (trustee liable for any losses to trust caused by his breach). It makes no difference to the shareholder whether the corporate insider gained or intended to gain personally from the transaction; the shareholder still has lost because of the insider's misuse of nonpublic information. The duty is addressed not to the insider's motives,[10] but to his actions and their consequences on the shareholder. Personal gain is not an element of the breach of this duty.[11]

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[10] Of course, an insider is not liable in a Rule 10b–5 administrative action unless he has the requisite scienter. *Aaron* v. *SEC*, 446 U. S., at 691. He must know that his conduct violates or intend that it violate his duty. Secrist obviously knew and intended that Dirks would cause trading on the inside information and that Equity Funding shareholders would be harmed. The scienter requirement addresses the intent necessary to support liability; it does not address the motives behind the intent.

[11] The Court seems concerned that this case bears on insiders' contacts with analysts for valid corporate reasons. *Ante*, at 658–659. It also fears that insiders may not be able to determine whether the information transmitted is material or nonpublic. *Ante*, at 661–662. When the disclosure is to an investment banker or some other adviser, however, there is normally no breach because the insider does not have scienter: he does not intend that the inside information be used for trading purposes to the disadvantage of shareholders. Moreover, if the insider in good faith does not believe that the information is material or nonpublic, he also lacks the necessary scienter. *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 197. In fact, the scienter requirement functions in part to protect good-faith errors of this type. *Id.*, at 211, n. 31.

Should the adviser receiving the information use it to trade, it may breach a separate contractual or other duty to the corporation not to misuse the information. Absent such an arrangement, however, the adviser is not barred by Rule 10b–5 from trading on that information if it believes that the insider has not breached any duty to his shareholders. See *Walton* v. *Morgan Stanley & Co.*, 623 F. 2d 796, 798–799 (CA2 1980).

The situation here, of course, is radically different. *Ante*, at 658, n. 18 (Dirks received information requiring no analysis "as to its market relevance"). Secrist divulged the information for the precise purpose of causing Dirks' clients to trade on it. I fail to understand how imposing liability on Dirks will affect legitimate insider-analyst contacts.

This conclusion is borne out by the Court's decision in *Mosser* v. *Darrow*, 341 U. S. 267 (1951). There, the Court faced an analogous situation: a reorganization trustee engaged two employee-promoters of subsidiaries of the companies being reorganized to provide services that the trustee considered to be essential to the successful operation of the trust. In order to secure their services, the trustee expressly agreed with the employees that they could continue to trade in the securities of the subsidiaries. The employees then turned their inside position into substantial profits at the expense both of the trust and of other holders of the companies' securities.

The Court acknowledged that the trustee neither intended to nor did in actual fact benefit from this arrangement; his motives were completely selfless and devoted to the companies. *Id.*, at 275. The Court, nevertheless, found the trustee liable to the estate for the activities of the employees he authorized.[12] The Court described the trustee's defalcation as "a willful and deliberate setting up of an interest in employees adverse to that of the trust." *Id.*, at 272. The breach did not depend on the trustee's personal gain, and his motives in violating his duty were irrelevant; like Secrist, the trustee intended that others would abuse the inside information for their personal gain. Cf. *Dodge* v. *Ford Motor Co.*, 204 Mich. 459, 506–509, 170 N. W. 668, 684–685 (1919) (Henry Ford's philanthropic motives did not permit him to set Ford Motor Company dividend policies to benefit public at expense of shareholders).

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[12] The duty involved in *Mosser* was the duty to the corporation in trust not to misappropriate its assets. This duty, of course, differs from the duty to shareholders involved in this case. See n. 7, *supra*. Trustees are also subject to a higher standard of care than scienter. 3 A. Scott, Law of Trusts § 201, p. 1650 (3d ed. 1967). In addition, strict trustees are bound not to trade in securities at all. See Langevoort, 70 Calif. L. Rev., at 2, n. 5. These differences, however, are irrelevant to the principle of *Mosser* that the motive of personal gain is not essential to a trustee's liability. In *Mosser*, as here, personal gain accrued to the tippees. See 341 U. S., at 273.

As *Mosser* demonstrates, the breach consists in taking action disadvantageous to the person to whom one owes a duty. In this case, Secrist owed a duty to purchasers of Equity Funding shares. The Court's addition of the bad-purpose element to a breach-of-fiduciary-duty claim is flatly inconsistent with the principle of *Mosser*. I do not join this limitation of the scope of an insider's fiduciary duty to shareholders.[13]

III

The improper-purpose requirement not only has no basis in law, but it also rests implicitly on a policy that I cannot accept. The Court justifies Secrist's and Dirks' action because the general benefit derived from the violation of Secrist's duty to shareholders outweighed the harm caused to those shareholders, see Heller, *Chiarella*, SEC Rule 14e–3 and *Dirks:* "Fairness" versus Economic Theory, 37 Bus. Lawyer 517, 550 (1982); Easterbrook, Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information, 1981 S. Ct. Rev. 309, 338—in other words, because the end justified the means. Under this view, the benefit conferred on society by Secrist's and Dirks' activities may be paid for with the losses caused to shareholders trading with Dirks' clients.[14]

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[13] Although I disagree in principle with the Court's requirement of an improper motive, I also note that the requirement adds to the administrative and judicial burden in Rule 10b–5 cases. Assuming the validity of the requirement, the SEC's approach—a violation occurs when the insider knows that the tippee will trade with the information, Brief for Respondent 31—can be seen as a presumption that the insider gains from the tipping. The Court now requires a case-by-case determination, thus prohibiting such a presumption.

The Court acknowledges the burdens and difficulties of this approach, but asserts that a principle is needed to guide market participants. *Ante*, at 664. I fail to see how the Court's rule has any practical advantage over the SEC's presumption. The Court's approach is particularly difficult to administer when the insider is not directly enriched monetarily by the trading he induces. For example, the Court does not explain why the benefit Secrist obtained—the good feeling of exposing a fraud and his enhanced reputation—is any different from the benefit to an insider who gives the information as a gift to a friend or relative. Under the Court's somewhat cynical view, gifts involve personal gain. See *ibid.* Secrist surely gave Dirks a gift of the commissions Dirks made on the deal in order to induce him to disseminate the information. The distinction between pure altruism and self-interest has puzzled philosophers for centuries; there is no reason to believe that courts and administrative law judges will have an easier time with it.

Although Secrist's general motive to expose the Equity Funding fraud was laudable, the means he chose were not. Moreover, even assuming that Dirks played a substantial role in exposing the fraud,[15] he and his clients should not profit from the information they obtained from Secrist. Misprision of a felony long has been against public policy. *Branzburg* v. *Hayes*, 408 U. S. 665, 696–697 (1972); see 18 U. S. C. §4. A person cannot condition his transmission of information of a crime on a financial award. As a citizen, Dirks had at least an ethical obligation to report the information to the proper authorities. See *ante*, at 661, n. 21. The Court's holding is deficient in policy terms not because it fails to create a legal norm out of that ethical norm, see *ibid.*, but because it actually rewards Dirks for his aiding and abetting.

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[14] This position seems little different from the theory that insider trading should be permitted because it brings relevant information to the market. See H. Manne, Insider Trading and the Stock Market 59–76, 111–146 (1966); Manne, Insider Trading and the Law Professors, 23 Vand. L. Rev. 547, 565–576 (1970). The Court also seems to embrace a variant of that extreme theory, which postulates that insider trading causes no harm at all to those who purchase from the insider. *Ante*, at 666–667, n. 27. Both the theory and its variant sit at the opposite end of the theoretical spectrum from the much maligned equality-of-information theory, and never have been adopted by Congress or ratified by this Court. See Langevoort, 70 Calif. L. Rev., at 1, and n. 1. The theory rejects the existence of any enforceable principle of fairness between market participants.

[15] The Court uncritically accepts Dirks' own view of his role in uncovering the Equity Funding fraud. See *ante*, at 658, n. 18. It ignores the fact that Secrist gave the same information at the same time to state insurance regulators, who proceeded to expose massive fraud in a major Equity Funding subsidiary. The fraud surfaced before Dirks ever spoke to the SEC.

Dirks and Secrist were under a duty to disclose the information or to refrain from trading on it.[16] I agree that disclosure in this case would have been difficult. *Ibid.* I also recognize that the SEC seemingly has been less than helpful in its view of the nature of disclosure necessary to satisfy the disclose-or-refrain duty. The Commission tells persons with inside information that they cannot trade on that information unless they disclose; it refuses, however, to tell them how to disclose.[17] See *In re Faberge, Inc.*, 45 S. E. C. 249, 256 (1973) (disclosure requires public release through public media designed to reach investing public generally). This seems to be a less than sensible policy, which it is incumbent on the Commission to correct. The Court, however, has no authority to remedy the problem by opening a hole in the congressionally mandated prohibition on insider trading, thus rewarding such trading.

IV

In my view, Secrist violated his duty to Equity Funding shareholders by transmitting material nonpublic information to Dirks with the intention that Dirks would cause his clients to trade on that information. Dirks, therefore, was under a duty to make the information publicly available or to refrain from actions that he knew would lead to trading. Because Dirks caused his clients to trade, he violated § 10(b) and Rule 10b–5. Any other result is a disservice to this country's attempt to provide fair and efficient capital markets. I dissent.

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[16] Secrist did pass on his information to regulatory authorities. His good but misguided motive may be the reason the SEC did not join him in the administrative proceedings against Dirks and his clients. The fact that the SEC, in an exercise of prosecutorial discretion, did not charge Secrist under Rule 10b–5 says nothing about the applicable law. Cf. *ante*, at 665, n. 25 (suggesting otherwise). Nor does the fact that the SEC took an unsupportable legal position in proceedings below indicate that neither Secrist nor Dirks is liable under any theory. Cf. *ibid.* (same).

[17] At oral argument, the SEC's view was that Dirks' obligation to disclose would not be satisfied by reporting the information to the SEC. Tr. of Oral Arg. 27, quoted *ante*, at 661, n. 21. This position is in apparent conflict with the statement in its brief that speaks favorably of a safe harbor rule under which an investor satisfies his obligation to disclose by reporting the information to the Commission and then waiting a set period before trading. Brief for Respondent 43–44. The SEC, however, has neither proposed nor adopted a rule to this effect, and thus persons such as Dirks have no real option other than to refrain from trading.

RUCKELSHAUS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* SIERRA CLUB ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-242. Argued April 25, 1983—Decided July 1, 1983

Section 307(f) of the Clean Air Act provides that in a proceeding for judicial review of an emission standard promulgated under the Act, the court may award reasonable attorney's fees "whenever it determines that such award is appropriate." Respondents filed petitions in the Court of Appeals for review of the Environmental Protection Agency's standards limiting the emission of sulfur dioxide by coal-burning powerplants. The Court of Appeals rejected respondents' claims challenging the validity of the standards. Subsequently, the Court of Appeals granted respondents' request for attorney's fees incurred in the review proceedings, awarding a specified amount to each respondent.

Held: Absent some degree of success on the merits by the claimant, it is not "appropriate" for a federal court to award attorney's fees under § 307(f). Pp. 682–694.

(a) There is nothing in § 307(f) to indicate that Congress meant to abandon historic fee-shifting principles and intuitive notions of fairness when it enacted that section. Instead, it appears that the term "appropriate" modifies but does not completely reject the traditional rule that a fee claimant must "prevail" before it may recover attorney's fees. This result is the most reasonable interpretation of congressional intent. Pp. 682–686.

(b) The legislative history of § 307(f) does not support respondents' argument that the section was intended as a radical departure from the traditional rule. Moreover, the relation between § 307(f) and § 304(d), which like § 307(f) provides for the award of attorney's fees when "appropriate," refutes respondents' argument, since if that argument were accepted it would mean that in an unsuccessful suit brought under § 304 by a private citizen against a private business for alleged violations of the Clean Air Act the winning defendant could be required to pay the losing plaintiff's attorney's fees, a result which Congress certainly did not intend. Pp. 686–693.

217 U. S. App. D. C. 180, 672 F. 2d 33, and 221 U. S. App. D. C. 450, 684 F. 2d 972, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 694.

Kathryn A. Oberly argued the cause for petitioner. With her on the briefs were *Solicitor General Lee, Assistant Attorney General Dinkins, Deputy Solicitor General Claiborne, Anne S. Almy*, and *James M. Spears.*

Harold R. Tyler, Jr., argued the cause for respondents. *Bingham Kennedy* and *Barry J. Trilling* filed a brief for respondent Environmental Defense Fund. *Joseph J. Brecher* filed a brief for respondent Sierra Club.

JUSTICE REHNQUIST delivered the opinion of the Court.

In 1979, following a year of study and public comment, the Environmental Protection Agency (EPA) promulgated standards limiting the emission of sulfur dioxide by coal-burning powerplants. Both respondents in this case—the Environmental Defense Fund (EDF) and the Sierra Club—filed petitions for review of the agency's action in the United States Court of Appeals for the District of Columbia Circuit. EDF argued that the standards promulgated by the EPA were tainted by the agency's *ex parte* contacts with representatives of private industry, while the Sierra Club contended that EPA lacked authority under the Clean Air Act to issue the type of standards that it did. In a lengthy opinion, the Court of Appeals rejected all the claims of both EDF and the Sierra Club. *Sierra Club* v. *Costle*, 211 U. S. App. D. C. 336, 657 F. 2d 298 (1981).

Notwithstanding their lack of success on the merits, EDF and the Sierra Club filed a request for attorney's fees incurred in the *Sierra Club* action. They relied on § 307(f) of the Clean Air Act, 91 Stat. 777, 42 U. S. C. § 7607(f) (1976 ed., Supp. V), which permits the award of attorney's fees in certain proceedings "whenever [the court] determines that such award is appropriate." Respondents argued that, despite their failure to obtain any of the relief they requested, it was "appropriate" for them to receive fees for their contributions to the goals of the Clean Air Act. The Court of Appeals agreed with respondents, ultimately awarding some $45,000 to the Sierra Club and some $46,000 to EDF. *Sierra Club* v. *Gorsuch,* 217 U. S. App. D. C. 180, 672 F. 2d 33 (1982); *Sierra Club* v. *Gorsuch,* 221 U. S. App. D. C. 450, 684 F. 2d 972 (1982). We granted certiorari, 459 U. S. 942 (1982), to consider the important question decided by the Court of Appeals.[1]

I

The question presented by this case is whether it is "appropriate," within the meaning of § 307(f) of the Clean Air Act, to award attorney's fees to a party that achieved no success on the merits of its claims. We conclude that the language of the section, read in the light of the historic principles of fee-shifting in this and other countries, requires the conclusion that some success on the merits be obtained before a party becomes eligible for a fee award under § 307(f).

A

Section 307(f) provides only that:

> "In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attor-

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[1] Sixteen federal statutes and § 304(d) of the Clean Air Act, 42 U. S. C. § 7604(d) (1976 ed., Supp. V), contain provisions for awards of attorney's fees identical to § 307(f). See, *e. g.*, Toxic Substances Control Act, 15 U. S. C. § 2618(d); Endangered Species Act, 16 U. S. C. § 1540(g)(4); Surface Mining Control and Reclamation Act, 30 U. S. C. § 1270(d) (1976 ed., Supp. V); Deep Seabed Hard Mineral Resources Act, 30 U. S. C. § 1427(c) (1976 ed., Supp. V); Clean Water Act, 33 U. S. C. § 1365(d); Marine Protection, Research and Sanctuaries Act, 33 U. S. C. § 1415(g)(4); Deepwater Port Act, 33 U. S. C. § 1515(d); Safe Drinking Water Act, 42 U. S. C. § 300j–8(d); Noise Control Act, 42 U. S. C. § 4911(d); Energy Policy and Conservation Act, 42 U. S. C. § 6305(d); Powerplant and Industrial Fuel Use Act, 42 U. S. C. § 8435(d) (1976 ed., Supp. V); Ocean Thermal

ney and expert witness fees) *whenever it determines that such award is appropriate.*" 91 Stat. 777, 42 U. S. C. § 7607(f) (1976 ed., Supp. V) (emphasis added).

It is difficult to draw any meaningful guidance from § 307 (f)'s use of the word "appropriate," which means only "specially suitable: fit, proper." Webster's Third New International Dictionary 106 (1976).[2] Obviously, in order to decide when fees should be awarded under § 307(f), a court first must decide *what* the award should be "specially suitable," "fit," or "proper" *for*. Section 307(f) alone does not begin to answer this question, and application of the provision thus requires reference to other sources, including fee-shifting rules developed in different contexts. As demonstrated below, inquiry into these sources shows that requiring a defendant, completely successful on all issues, to pay the unsuccessful plaintiff's legal fees would be a radical departure from longstanding fee-shifting principles adhered to in a wide range of contexts.

B

Our basic point of reference is the "American Rule," see *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U. S. 240,

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Energy Conversion Act, 42 U. S. C. § 9124(d) (1976 ed., Supp. V); and Outer Continental Shelf Lands Act, 43 U. S. C. § 1349(a)(5) (1976 ed., Supp. V). As explained below, the interpretation of "appropriate" in § 307(f) controls construction of the term in these statutes.

[2] Dissenting from an award of fees under § 307(f) by the Court of Appeals for the District of Columbia Circuit, Judge Wilkey noted "the absence of any clue as to the meaning of 'appropriate,'" and wrote that "*there is no comprehensible or principled meaning for 'appropriate.'*" *Alabama Power Co.* v. *Gorsuch*, 217 U. S. App. D. C. 148, 171, 179, 672 F. 2d 1, 24, 32 (1982). The Senate Report to § 307 also illustrates the lack of guidance provided by the plain language of the section. The Report observed that "[t]he purpose of the amendment to section 307 is to carry out the intent of the committee in 1970 that a court may, *in its discretion*, award costs of litigation to a party bringing a suit under section 307 of the Clean Air Act." S. Rep. No. 95-127, p. 99 (1977) (emphasis added). See also H. R. Rep. No. 95-294, p. 28 (1977).

247 (1975) (emphasis added), under which even "the *prevailing* litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the *loser*." It is clear that generations of American judges, lawyers, and legislators, with this rule as the point of departure, would regard it as quite "inappropriate" to award the "loser" an attorney's fee from the "prevailing litigant." Similarly, when Congress has chosen to depart from the American Rule by statute, virtually every one of the more than 150 existing federal fee-shifting provisions predicates fee awards on *some* success by the claimant; while these statutes contain varying standards as to the precise degree of success necessary for an award of fees—such as whether the fee claimant was the "prevailing party,"[3] the "substantially prevailing" party,[4] or "successful"[5]—the consistent rule is that complete failure will not justify shifting fees from the losing party to the winning party. Also instructive is Congress' reaction to a draft of the Equal Access to Justice Act, which permitted shifting fees from losing parties to the Government, if "in the interest of justice," S. 2354, 95th Cong., 2d Sess. (1978). This provision, criticized by the Justice Department as a "radical" departure from traditional principles, was rejected by Congress.[6] Finally, English courts have awarded counsel fees to *successful* litigants for 750 years, see

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[3] See, *e. g.*, 5 U. S. C. § 504(a)(1) (1982 ed.); Commodity Exchange Act, 7 U. S. C. § 18(f); Voting Rights Act of 1965, 42 U. S. C. § 1973*l*(e); Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988 (1976 ed., Supp. V).

[4] See, *e. g.*, Freedom of Information Act, 5 U. S. C. § 552(a)(4)(E); Privacy Act, 5 U. S. C. §§ 552a(g)(2)(B), 552a(g)(3)(B); Government in the Sunshine Act, 5 U. S. C. § 552b(i).

[5] See, *e. g.*, Real Estate Settlement Procedures Act, 12 U. S. C. § 2607(d)(2); Right to Financial Privacy Act, 12 U. S. C. § 3417(a)(4) (1982 ed.); Jewelers' Liability Act, 15 U. S. C. § 298(c).

[6] Equal Access to Courts: Hearing on S. 2354 before the Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, 95th Cong., 2d Sess., 31, 50 (1978).

Alyeska, supra, at 247, n. 18, but they have never gone so far as to force a vindicated defendant to pay the plaintiff's legal expenses.

While the foregoing treatments of fee-shifting differ in many respects, they reflect one consistent, established rule: a successful party need not pay its unsuccessful adversary's fees. The uniform acceptance of this rule reflects, at least in part, intuitive notions of fairness to litigants. Put simply, ordinary conceptions of just returns reject the idea that a party who wrongly charges someone with violations of the law should be able to force that defendant to pay the costs of the wholly unsuccessful suit against it. Before we will conclude Congress abandoned this established principle that a successful party need not pay its unsuccessful adversary's fees—rooted as it is in intuitive notions of fairness and widely manifested in numerous different contexts—a clear showing that this result was intended is required.[7]

Also relevant in deciding whether to accept the reading of "appropriate" urged by respondents is the fact that § 307(f) affects fee awards against the United States, as well as against private individuals. Except to the extent it has waived its immunity, the Government is immune from claims for attorney's fees, *Alyeska, supra,* at 267–268, and n. 42. Waivers of immunity must be "construed strictly in favor of the sovereign," *McMahon* v. *United States,* 342 U. S. 25, 27 (1951), and not "enlarge[d] . . . beyond what the language requires." *Eastern Transportation Co.* v. *United States,*

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[7] Indeed, when Congress *has* desired such a change it has said so expressly, as in 15 U. S. C. § 2605(c)(4)(A), permitting fee awards if a party "represents an interest which would substantially contribute to a fair determination of the issues," even if the participant's views are rejected. If Congress intended the truly radical departure from American and English common law and countless federal fee-shifting statutes that the Court of Appeals attributes to it, it no doubt would have used explicit language to this effect—as it did in 15 U. S. C. § 2605.

272 U. S. 675, 686 (1927). In determining what sorts of fee awards are "appropriate," care must be taken not to "enlarge" § 307(f)'s waiver of immunity beyond what a fair reading of the language of the section requires.

Given all the foregoing, we fail to find in § 307(f) the requisite indication that Congress meant to abandon historic fee-shifting principles and intuitive notions of fairness when it enacted the section. Instead, we believe that the term "appropriate" modifies but does not completely reject the traditional rule that a fee claimant must "prevail" before it may recover attorney's fees. This result is the most reasonable interpretation of congressional intent.

II

Respondents make relatively little effort to dispute much of the foregoing, devoting their principal attention to the legislative history of § 307(f). Respondents' arguments rest primarily on the following excerpt from the 1977 House Report on § 307(f):[8]

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[8] Respondents also rely on a single sentence from the 1970 Senate Report:

"The Courts should recognize that in bringing *legitimate actions* under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party. This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions." S. Rep. No. 91–1196, p. 38 (emphasis added).

The approval of fee awards in "legitimate" actions offers respondents little comfort: "legitimate" means "being exactly as proposed: neither spurious nor false," which does not describe respondents' claims in this case. Respondents contend, however, that Congress intended the term "appropriate" to encompass situations beyond those mentioned in the legislative history, and, therefore, that the term reaches even totally unsuccessful actions. This is, of course, possible, but not likely. Congress found it necessary to explicitly state that the term appropriate "extended" to suits that forced defendants to abandon illegal conduct, although without a formal

> "The committee bill also contains express authority for the courts to award attorneys *[sic]* fees and expert witness fees in two situations. The judicial review proceedings under section 307 of the act when the court determines such award is appropriate *[sic]*.
>
> "In the case of the section 307 judicial review litigation, the purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest. *The committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the 'prevailing party.'* In fact, such an amendment was expressly rejected by the committee, largely on the grounds set forth in *NRDC* v. *EPA*, 484 F. 2d 1331, 1388 *[sic]* (1st Cir. 1973)." H. R. Rep. No. 95-294, p. 337 (1977) (emphasis added).

In determining the meaning of the Senate Report's rejection of the "prevailing party" standard it first is necessary to ascertain what this standard was understood to mean. When § 307(f) was enacted, the "prevailing party" standard had been interpreted in a variety of rather narrow ways. See, *e. g.*, *Taylor* v. *Safeway Stores, Inc.*, 524 F. 2d 263, 273 (CA10 1975); *Pearson* v. *Western Electric Co.*, 542 F. 2d 1150 (CA10 1976); *Best Medium Publishing Co.* v. *National Insider, Inc.*, 385 F. 2d 384, 386 (CA7) (the " 'prevailing party'

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court order; this was no doubt viewed as a somewhat expansive innovation, since, under then-controlling law, see *infra*, some courts awarded fees only to parties formally prevailing in court. We are unpersuaded by the argument that this same Congress was so sure that "appropriate" also would extend to the far more novel, costly, and intuitively unsatisfying result of awarding fees to unsuccessful parties that it did not bother to mention the fact. If Congress had intended the far-reaching result urged by respondents, it plainly would have said so, as is demonstrated by Congress' careful statement that a *less* sweeping innovation *was* adopted.

is the one who prevails as to the substantial part of the litigation"), aff'g 259 F. Supp. 433 (ND Ill. 1967); *Dobbins* v. *Local 212, Int'l Brotherhood of Electrical Workers, AFL–CIO*, 292 F. Supp. 413, 450 (SD Ohio 1968); *Goodall* v. *Mason*, 419 F. Supp. 980 (ED Va. 1976); *Clanton* v. *Allied Chemical Corp.*, 409 F. Supp. 282 (ED Va. 1976). Some courts—although, to be sure, a minority—denied fees to plaintiffs who lacked a formal court order granting relief, while others required showings not just of some success, but "substantial" success. Indeed, even today, courts require that, to be a "prevailing party," one must succeed on the "central issue," *Coen* v. *Harrison County School Bd.*, 638 F. 2d 24, 26 (CA5 1981), or "essentially succee[d] in obtaining the relief he seeks in his claims on the merits," *Bagby* v. *Beal*, 606 F. 2d 411, 415 (CA3 1979). See also *Hensley* v. *Eckerhart*, 461 U. S. 424, 433, n. 8 (1983).

These various interpretations of the "prevailing party" standard provide a ready, and quite sensible, explanation for the Senate Report's discussion of § 307(f). Section 307(f) was meant to expand the class of parties eligible for fee awards from prevailing parties to *partially prevailing* parties—parties achieving *some success*, even if not major success.[9] Put differently, by enacting § 307(f), Congress intended to eliminate both the restrictive readings of "prevailing party" adopted in some of the cases cited above and the necessity for case-by-case scrutiny by federal courts into whether plaintiffs prevailed "essentially" on "central issues."

This view of the "when appropriate" standard is confirmed by the language of a forerunner of § 307, § 36 of S. 252, 95th Cong., 1st Sess. (1977):

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[9] Of course, we do not mean to suggest that trivial success on the merits, or purely procedural victories, would justify an award of fees under statutes setting out the "when appropriate" standard. Rather, Congress meant merely to avoid the necessity for lengthy inquiries into the question whether a particular party's success was "substantial" or occurred on a "central issue."

> "(d) In any judicial proceeding under this Act in which the United States . . . is a party . . . any party other than the United States which *prevails in such action* shall recover from the United States the reasonable costs for such party's participation in such proceeding, including reasonable attorney's fees. . . . In any case in which *such party prevails in part,* the court shall have discretion to award such reasonable costs." (Emphasis added.)

This provision was described, in the legislative history, as follows:

> "This section amends section 307 of existing law. In any suit in which the United States is a party, *any prevailing party* . . . shall recover all reasonable costs of its participation in such proceeding. Where such *party prevails in part,* the court may award reasonable costs."[10]

It is clear from the distinction drawn in these two passages that—as the case law discussed above fairly indicated—Congress understood "prevailing party" and "partially prevailing party" as two quite different things, with the former encompassing only a limited category of parties that achieved success in their lawsuits. The "prevailing party" category was thought *not* to extend to parties who prevailed only *in part.*

Given this, the House Report's statement that "the court's discretion . . . should [not] be restricted to cases in which the party seeking fees was the '*prevailing party,*'" H. R. Rep. No. 95–294, p. 337 (1977) (emphasis added), provides little, if any, support for the theory that completely unsuccessful plaintiffs may receive fees. Rather, the sentence, fairly read, means only that fees may be awarded to all parties who *prevail in part* as well as those who *prevail in full:* it rejects the restrictive notions of "prevailing party" adopted in *Pearson*, *supra*, and like cases, as well as difficult questions of what constitutes a "central" issue, or "essential" success. The Report, however, does not give any real support to the view that Congress meant to depart from the long-established rule that complete winners need not pay complete losers for suing them.[11]

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[10] Section-by-Section Analysis of S. 252 and S. 253, Prepared by the Staff of the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works, Serial No. 95–2, p. 36 (Comm. Print 1977) (emphasis added).

This straightforward reading of the House Report finds support in *Natural Resources Defense Council, Inc.* v. *EPA*, 484 F. 2d 1331 (CA1 1973), cited in the Report. There, the court considered whether fees should be denied under § 304(d) "because *some* issues were decided adversely to petitioners." *Id.*, at 1338. This argument was rejected, primarily because "petitioners were successful in several major respects; they should not be penalized for having *also* advanced some points of lesser weight." *Ibid.* (emphasis added). Needless to say, this holding does not mean that even if a party is unsuccessful in *all* respects, it still may recover fees from its opponent. Rather, the court's decision provides precise support for the view, urged above, that adoption of the "when appropriate" standard was intended to permit awards of fees to all partially prevailing parties. After all, this was just what the facts were in *NRDC* v. *EPA*.

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[11] Respondents observe that Congress failed to adopt the attorney's fee provision contained in S. 252, discussed above, requiring fee awards to "prevailing parties," and permitting awards to "partially prevailing parties." They argue that Congress' failure to adopt this rule indicates a desire to expand the availability of fee awards to parties not prevailing in any degree. The argument is unpersuasive. Congress almost certainly rejected the provision because it *required* fee awards to "prevailing parties." This rule was specifically criticized by several groups commenting on the proposed legislation. One group wrote: "[W]e strongly oppose Section 36 of S. 252. We see no basis for automatically providing court costs and attorney's fees for parties prevailing in litigation pursuant to the Act. If such parties represent a widespread public interest, they should be able to finance themselves." See 5 Legislative History of the Clean Air Act Amendments of 1977 (Committee Print compiled for the Senate Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-16, pp. 4241, 4255 (1978) (Chamber of Commerce). Indeed, the Natural Resources Defense Council told Congress that the provision *requiring* fee awards to "prevailing parties was "fundamentally unwise" and "wholly unprecedented in American law": it urged that the provision be rejected. *Id.*, at 4092. It is obvious, therefore, that S. 252 was rejected not because it was too restrictive in its awarding of fees, but because it *required*, rather than *permitted* awards of attorney's fees.

The foregoing reading of § 307(f) also finds support in other aspects of the legislative history. For example, § 307(f), as enacted, was regarded as *narrower* than the attorney's fee provision in S. 252, which, as mentioned above, was a forerunner of § 307(f). A section-by-section analysis of S. 252 and § 307(f) stated that the "conference report [setting out the current 'when appropriate' standard] contained a narrower House provision" than S. 252. Section-by-Section Analysis, *supra* n. 10, at 37. Yet, as the quotation, *supra*, at 689, shows, S. 252 permitted fee awards only to prevailing and partially prevailing parties, and *not* to completely losing parties. The statement that the current language of § 307(f) is "narrower" than S. 252 strongly suggests that *losing* parties were not intended to recover fee awards under the section. Moreover, the view that § 307(f) was "narrow" hardly comports with the somewhat radical departure from well-settled legal principles urged by respondents.

In addition, the relation between §§ 304(d) and 307(f) is instructive. Like § 307(f), § 304(d) provides that a court may award fees when "appropriate." Importantly, however, suits may be brought under § 304 against *private* parties alleged to be in violation of the requirements of the Clean Air Act. It is clear, as explained below, that, whatever general standard may apply under § 307(f), a similar standard applies under § 304(d). In *Northcross* v. *Memphis Bd. of Ed.*, 412 U. S. 427 (1973), we held that similar attorney's fee provisions should be interpreted *pari passu*, and read the "prevailing party" standard in 20 U. S. C. § 1617 as identical to that in 42 U. S. C. § 2000a–3(b). In *Hensley*, 461 U. S., at 433, n. 7, we held that "the standards set forth . . . are generally applicable to all cases in which Congress has authorized an award of fees to a 'prevailing party.'" See also *BankAmerica Corp.* v. *United States*, 462 U. S. 122, 129 (1983). Thus, it is clear, at least as a general principle, that awards of attorney's fees under § 304(d) will be "appropriate" in circumstances similar to those that are "appropriate" under § 307(f).

Given the foregoing, respondents' argument that fee awards are available even to unsuccessful plaintiffs encounters yet further difficulties. Section 304 suits may be brought against private businesses by any private citizen. Such suits frequently involve novel legal theories, theories that the EPA has rejected. After protracted litigation requiring payment of expensive legal fees and associated costs in both money and manpower, the private defendant may well succeed in refuting each charge against it—proving it was in complete compliance with every detail of the Clean Air Act. Yet, under respondents' view of the Act, the defendant's reward could be a second lawyer's bill—this one payable to those who wrongly accused it of violating the law. We simply do not believe that Congress would have intended such a result without clearly saying so.[12]

Finally, as shown in the margin,[13] the central purpose of § 304(d) was to check the "multiplicity of [potentially meritless] suits," that Congress feared would follow the authorization of suits under the Clean Air Act, which was seen as an "unprecedented" innovation. One might well imagine the surprise of the legislators who voted for this section as an instrument for deterring meritless suits upon learning that instead it could be employed to fund such suits.

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[12] We do not mean to suggest that private parties should be treated in exactly the same manner as governmental entities. Differing abilities to bear the cost of legal fees and differing notions of responsibility for fulfilling the goals of the Clean Air Act likely would justify exercising special care regarding the award of fees against private parties.

[13] Because, as just shown, §§ 304(d) and 307(f) have similar meanings, the history of § 304 is relevant to a construction of § 307(f). The 1970 Clean Air Amendments contained a new concept—the statutory authorization of "citizens suits," allowing private citizens to sue any person violating the Clean Air Act. This provision attracted vehement opposition in Congress. Senator Hruska, for example, read a memorandum observing that the section "*is unprecedented in American history.*" 1 Legislative History of the Clean Air Amendments of 1970 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress) Ser.

III

We conclude, therefore, that the language and legislative history of § 307(f) do not support respondents' argument that the section was intended as a radical departure from established principles requiring that a fee claimant attain some success on the merits before it may receive an award of fees. Instead, we are persuaded that if Congress intended such a

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No. 93-18, p. 277 (1974) (Senate debate on S. 4358, Sept. 21, 1970). The memorandum predicted that § 304 "*will result in a multiplicity of suits which will interfere with the Executive's capability of carrying out its duties*" and warned that § 304's "open invitation to the institution of Citizens Suits" would "*impose an impossible burden on the already burdened judicial system.*" *Id.*, at 278.

The principal response to these concerns was as follows:

> "The Senator from Nebraska raised the question of possible harassing suits by citizens. This the committee attempted to discourage by providing that the costs of litigation—including counsel fees—may be awarded by the courts to the defendants in such cases, so that the citizen who brings a harassing suit is subject not only to the loss of his own costs of litigation, but to the burden of bearing the costs of the parties against whom he has brought the suit in the first instance. I doubt very much that individual citizens would lightly engage this possibility." *Id.*, at 280.

This point was repeated in the Senate Report:

> "Concern was expressed that some lawyers would use section 304 to bring frivolous and harassing actions. The Committee has added a key element in providing that the courts may award costs of litigation, including reasonable attorney and expert witness fees, whenever the court determines that such action is in the public interest. The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing. This should have the effect of discouraging abuse of this provision, while at the same time encouraging the quality of the actions that will be brought." S. Rep. No. 91-1196, p. 38 (1970).

novel result—which would require federal courts to make sensitive, difficult, and ultimately highly subjective determinations—it would have said so in far plainer language than that employed here. Hence, we hold that, absent some degree of success on the merits by the claimant, it is not "appropriate" for a federal court to award attorney's fees under § 307(f). Accordingly, the judgment of the Court of Appeals is

Reversed.

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

Even though the Court may regard the practice as "novel, costly, and intuitively unsatisfying," *ante*, at 687, n. 8, it is not at all unusual for a government to pay an unsuccessful adversary's counsel fees; indeed, in the largest category of litigation in which governments engage—criminal litigation—they do so routinely.[1] The question presented in this case is whether Congress has authorized any such award in a challenge to rulemaking by the Environmental Protection Agency. Today the Court holds that, no matter how exceptional the circumstances may be, Congress intended such awards to be made only to prevailing parties. But in § 307(f) Congress deliberately used language that differs from the "prevailing party" standard, and it carefully explained in the legislative history that it intended to give the courts of appeals discretionary authority to award fees and costs to a broader category of parties. If one reads that statute and its legislative history without any strong predisposition in favor of or against the "American Rule" endorsed by the Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 247 (1975), and repeatedly rejected by Congress thereafter, the answer is really quite plain—and it is not the one the Court engrafts on the statute.

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[1] See 18 U. S. C. § 3006A(d) (1976 ed. and Supp. V).

I

The Court gives a one-dimensional description of the role played by respondents, Sierra Club and the Environmental Defense Fund, in the *Sierra Club* v. *Costle*, 211 U. S. App. D. C. 336, 657 F. 2d 298 (1981), litigation: they failed to obtain any of the relief they requested. It is necessary to examine this uniquely important and complex litigation more thoroughly in order to illuminate the other considerations that are relevant to an award of attorney's fees under § 307(f) of the Clean Air Act.

The millions of tons of sulfur dioxide emitted by coal-burning powerplants constitute a major source of air pollution in the United States. One method of reducing sulfur dioxide emissions is to install flue gas desulfurization equipment; another is to burn coal with lower sulfur content. In 1977 Congress amended the section of the Clean Air Act governing emission standards for newly built or modified stationary pollution sources, including powerplants. These amendments raised significant questions regarding the pollution control methods that would be required in new powerplants and the levels of sulfur dioxide emissions that would result across the Nation. Section 111, as amended, required EPA to establish standards setting an emission ceiling for each category of new sources and also requiring each such plant to achieve a "percentage reduction" in the emissions that would have resulted from the use of untreated fuels.[2] In 1979, following a lengthy rulemaking proceeding under the Act, the EPA promulgated a controversial new standard for sulfur dioxide emissions by coal-burning powerplants. The standard established an emissions ceiling of 1.2 pounds/MBtu of sulfur dioxide for all new plants. In addition, it required each new plant to achieve 90% reduction of sulfur dioxide emissions, given the sulfur content of the coal used, except that plants using coal with sufficiently low sulfur content could reduce their emissions by as little as 70% as long as the resulting emissions did not exceed 0.6 pounds/MBtu.[3]

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[2] 42 U. S. C. § 7411(a)(1)(A) (1976 ed., Supp. V). See generally Ackerman & Hassler, Beyond the New Deal: Coal and the Clean Air Act, 89 Yale L. J. 1466, 1494–1514 (1980); Ayres & Doniger, New Source Standard for Power Plants II: Consider the Law, 3 Harv. Envt'l L. Rev. 63 (1979); Currie, Direct Federal Regulation of Stationary Sources Under the Clean Air Act, 128 U. Pa. L. Rev. 1389, 1407–1431 (1980).

The provisions of EPA's sulfur dioxide standard were interrelated. The Clean Air Act requires EPA to engage in a balancing of factors: "a standard of performance shall reflect the degree of emission limitation and the percentage reduction achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." 42 U. S. C. § 7411(a)(1)(C) (1976 ed., Supp. V). Thus, in the rulemaking proceeding, EPA considered various projections of the aggregate costs and nationwide levels of sulfur dioxide emissions that would result from different combinations of requirements. Its evaluation of various proposed standards relied on its understanding of the state of available technology, the likelihood of future technological improvements, and the availability of various types of coal with differing sulfur content.[4]

A number of parties filed petitions for review of the EPA's action in the United States Court of Appeals for the District of Columbia Circuit. As the Court of Appeals wrote: "On this appeal we consider challenges to the revised NSPS [new source performance standards] brought by environmental groups which contend that the standards are too lax and by electric utilities which contend that the standards are too rigorous." *Sierra Club* v. *Costle*, 211 U. S. App. D. C., at 349–350, 657 F. 2d, at 311–312. Eighty-seven utility companies and two utility industry organizations challenged the strictness of the 90% reduction requirement as well as the 0.03 pounds/ MBtu limit on emissions of particulate matter. On the other hand, the Sierra Club and the State of California Air Resources Board opposed the variable percentage reduction standard, contending that the statute required a uniform percentage reduction and that the record did not support EPA's action. The Environmental Defense Fund challenged the 1.2 pounds/MBtu ceiling on procedural grounds, contending that EPA failed to adopt a more stringent standard because of *ex parte* contacts after the close of the comment period. Intervenor-respondents in the Court of Appeals included various electric utilities, which filed briefs defending the variable percentage reduction standard and the 1.2 pounds/MBtu ceiling, and the National Coal Association, which opposed EDF's claim that the 1.2 pounds/MBtu standard was invalid due to procedural impropriety.

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[3] See B. Ackerman & W. Hassler, Clean Coal/Dirty Air 79–103 (1981). The new EPA standard also limited emissions of particulate matter by new coal-burning powerplants to 0.03 pounds/MBtu. 44 Fed. Reg. 33580 (1979). MBtu stands for "million British thermal units," a measure of heat energy.

[4] Ackerman & Hassler, *supra* n. 3, at 79–103; 44 Fed. Reg., at 33581–33584; *Sierra Club* v. *Costle*, 211 U. S. App. D. C. 336, 360–390, 394–424, 657 F. 2d 298, 322–352, 356–386 (1981).

These complex, interrelated contentions presented the Court of Appeals with an immense judicial task.

> "In formulating the regulation, EPA had prepared 120 studies, collected 400 items of reference literature, received almost 1,400 comments, written 650 letters and 200 interagency memoranda, held over 50 meetings and substantive telephone conversations with the public, and conducted four days of public hearings. The statement accompanying the regulation took up to 43 pages with triple columns and single-spaced type. Approximately 700 pages of briefs were submitted to this court on the merits of the case. The joint appendix contained 5,620

> pages, bound in 12 volumes. The certified index to the record listed over 2,520 submissions." *Sierra Club* v. *Gorsuch*, 217 U. S. App. D. C. 180, 187, 672 F. 2d 33, 40 (1982).[5]

The Court of Appeals rejected the petitions for review filed by the respondents in this case, the Sierra Club and the Environmental Defense Fund, although not entirely for the reasons stated by EPA; it also rejected the contentions of the utilities. The opinion, 256 pages in printed slip opinion form and 132 pages in the Federal Reporter, ended with "a short conclusion: the rule is reasonable." 211 U. S. App. D. C., at 448, 657 F. 2d, at 410.[6]

After further proceedings, the Court of Appeals unanimously decided that it was appropriate to award attorney's fees to both respondents.[7] It first concluded that § 307(f) gave it authority to award fees in an "appropriate" case even to a party that did not prevail on any issue it addressed. The court then explained in some detail the grounds for its conclusion that the respondents had substantially contributed to the goals of the Act. "While the occasions upon which non-prevailing parties will meet such criteria may be exceptional, . . . *Sierra Club* is such an occasion." 217 U. S. App. D. C., at 186, 672 F. 2d, at 39.[8]

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[5] See Wald, Making "Informed" Decisions on the District of Columbia Circuit, 50 Geo. Wash. L. Rev. 135, 145 (1982).

[6] The court's concluding discussion does not support petitioner's suggestion that "the court had no difficulty rejecting Sierra Club's construction of the statute." Brief for Petitioner 33, n. 21. The court wrote:

"We reach our decision after interminable record searching (and considerable soul searching). We have read the record with as hard a look as mortal judges can probably give its thousands of pages. We have adopted a simple and straight-forward standard of review, probed the agency's rationale, studied its references (and those of appellants), endeavored to understand them where they were intelligible (parts were simply impenetrable), and on close questions given the agency the benefit of the doubt out of deference for the terrible complexity of its job." 211 U. S. App. D. C., at 448, 657 F. 2d, at 410.

[7] The actual amount of the award was established in a subsequent *per curiam* opinion, *Sierra Club* v. *Gorsuch*, 221 U. S. App. D. C. 450, 684 F. 2d 972 (1982), from which Judge Robb dissented in part. The Sierra Club was awarded $44,715, plus $644.60 in expenses; the Environmental Defense Fund was awarded $45,874.10.

Sierra Club, the court noted, was the only party to brief and advocate opposition to a variable standard, an issue conceded by EPA to be critically important. Had this issue not been debated, moreover, the outcome of other related issues in the case—including the appropriateness of the 1.2 pounds/MBtu standard and the technological feasibility of the 90% reduction requirement—might have been affected. The court expressly stated: "[T]he argument pressed most intensely by the utilities, that a 90% reduction in sulfur emissions was technologically infeasible given the state of antipollution technology, would have been far less completely aired without Sierra Club's participation. The various parts of a complex rule like this one do not travel alone, and the court's education on each part of the rule informed its decisions on other parts." *Id.*, at 188, 672 F. 2d, at 41.[9]

The Court of Appeals explained that, even though respondents were not "prevailing parties," either in whole or in part, their participation may have made a difference in the outcome of the litigation.

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[8] The Court of Appeals made clear that it was adopting a stringent standard. Indeed, it noted that even a prevailing or substantially prevailing party might not substantially contribute to the goals of the Clean Air Act, and might therefore not be entitled to attorney's fees. 217 U. S. App. D. C., at 185, n. 8, 672 F. 2d, at 38, n. 8.

[9] See also *id.*, at 183, n. 5, 672 F. 2d, at 36, n. 5; *id.*, at 187, 672 F. 2d, at 40 (the utilities' challenge to feasibility was "defended by the environmental groups as well as EPA"). In its opinion on the merits, the court wrote that the evidence on both sides of the 90% reduction issue was "extraordinarily technical and often confusing." 211 U. S. App. D. C., at 398, 657 F. 2d, at 360.

In similar fashion, the Environmental Defense Fund played a critical role in informing the court's deliberations on a substantial issue—alleged *ex parte* contacts in the rulemaking process. EDF's substantial contribution included factual research, legal analysis, and the disclosure of Government documents without which, according to the court, "our deliberations would have been less enriched and more time consuming." 217 U. S. App. D. C., at 188, 672 F. 2d, at 41.

> "It was absolutely essential in a case of this dimension that this court have expert and articulate spokesmen for environmental as well as industrial interests. The rule-making process not only involved highly technical and complex data, but controversial considerations of public policy. Given the complexity of the subject matter, without competent representatives of environmental interests, the process of judicial review might have been fatally skewed." *Ibid.*

The then EPA Administrator disputed the amount of the fee award in the Court of Appeals, but petitioner does not contest its reasonableness before this Court. Petitioner also apparently does not assert that, if it is ever appropriate to award fees to a losing party, the Court of Appeals improperly exercised its discretion to make an award in this case.[10] Rather, petitioner asserts as a matter of law that § 307(f) of the Clean Air Act should be construed to forbid *any* award to *any* nonprevailing party. The majority accepts this contention. But the language of § 307(f), the legislative history, and the legislative history of § 304(d) all demonstrate that petitioner's position should be rejected.

II

The language of § 307(f) is straightforward. It provides:

> "In any judicial proceeding under this section, the court may award costs of litigation (including reasonable at-

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[10] "[T]he fundamental issue we have tendered—which is one of law rather than fact—is whether Congress intended the courts *ever* to have discretion to award fees to totally unsuccessful parties. Contrary to respondents' suggestions, the size or complexity of the case has no bearing on this question. . . . Thus, the Court need only determine whether, as a matter of law, the discretion conferred by Congress encompasses fee awards to totally unsuccessful litigants." Reply Brief for Petitioner 1–2 (filed Oct. 13, 1982).

> torney and expert witness fees) whenever it determines that such award is appropriate." 42 U. S. C. § 7607(f) (1976 ed., Supp. V).

The challenge to the sulfur dioxide emission standard in the Court of Appeals was unquestionably a "judicial proceeding under" § 307. That court explained the reasons why it believed that an award was appropriate in this case. It therefore complied with the plain language of the statute.

As the Court of Appeals correctly observed, the language of § 307(f) differs crucially from the wording of many other federal statutes authorizing the court to award attorney's fees and costs.[11] Most of those statutes expressly require that a party "prevail" or "substantially prevail" in order to obtain fees.[12] The contrast between the text of § 307(f) and the text of other attorney's fees statutes strongly supports the conclusion that Congress did not intend the outcome of the case to be conclusive in the decision whether to award fees under § 307(f).

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[11] In the absence of statute, the general rule in America is that each party must pay the fees of his own counsel. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 247 (1975). This rule prevails in federal litigation unless Congress has otherwise provided. Congress has enacted a variety of different attorney's fees statutes. In various situations, it has provided that a fee award for the prevailing party is mandatory, see, *e. g.*, 15 U. S. C. § 15 (1976 ed., Supp. V) (Clayton Act); that the court shall have authority to allow fees "in exceptional cases," see, *e. g.*, 35 U. S. C. § 285 (patent cases); or that an award should normally be made to a successful plaintiff "absent exceptional circumstances," see, *e. g.*, 42 U. S. C. § 1988 (1976 ed., Supp. V); *Hensley* v. *Eckerhart*, 461 U. S. 424, 429 (1983). Indeed, in one category of litigation—criminal cases—Congress has expressly mandated compensation for counsel for indigent defendants regardless of the outcome of the litigation. 18 U. S. C. § 3006A(d) (1976 ed. and Supp. V). "Under this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." *Alyeska Pipeline, supra*, at 262.

[12] For statutes limiting fees to "prevailing parties," see, *e. g.*, 5 U. S. C. § 504(a)(1) (1982 ed.) ("An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust"); 7 U. S. C. § 18(f) (Commodity

Nevertheless the Court today asserts that a statute which does not refer to "prevailing parties" actually *does* refer to "prevailing parties." It does so by invoking the "American Rule" that losing parties do not pay the attorney's fees of their successful opponents, and by asserting that "virtually every one of the more than 150 existing federal fee-shifting provisions predicates fee awards on *some* success by the claimant." *Ante*, at 684. Factually, as the Court's own opinion makes clear, this is something of an overstatement. After all, the Court notes that 16 federal statutes and § 304(d) of the Clean Air Act contain provisions for awards of attorney's fees identical to § 307(f). *Ante*, at 682–683, n. 1. Logi-

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Exchange Act) ("If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit"); 42 U. S. C. § 1973*l*(e) ("In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs"); 42 U. S. C., § 1988 (1976 ed., Supp. V) ("the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs").

For statutes limiting fees to "substantially prevailing" parties, see, *e. g.*, 5 U. S. C. § 552(a)(4)(E) (Freedom of Information Act) ("The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed"); 5 U. S. C. §§ 552a(g)(2)(B), 552a(g)(3)(B) (Privacy Act); 5 U. S. C. § 552b(i) (Government in the Sunshine Act).

For statutes requiring that a party be successful, see 12 U. S. C. § 2607(d)(2) (Real Estate Settlement Procedures Act) ("In any successful action to enforce the liability under this paragraph, the court may award the court costs of the action together with a reasonable attorney's fee as determined by the court"); 12 U. S. C. § 3417(a)(4) (1982 ed.) (Right to Financial Privacy Act); 15 U. S. C. § 298(c) (Jewelers' Liability Act) (any jewelry trade association may sue "and if successful shall recover the cost of suit, including a reasonable attorney's fee").

cally the assertion is a non sequitur. It begs the question at issue in this case—whether, by using significantly different language in § 307(f), Congress wished to depart from or to adopt the more customary standard.[13]

III

The legislative history, like the text of the statute, supports the conclusion that Congress intended to allow attorney's fees not only to prevailing parties but also, in appropriate circumstances, to nonprevailing parties. In 1977, when § 307(f) was added to the Clean Air Act, the Senate Committee considered, but did not adopt, a provision that would have required the Court of Appeals to award fees to any "party other than the United States which prevails in such action" and would have given it discretion to award fees to a party "[i]n any case in which such party prevails in part."[14]

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[13] If one assumes, as apparently the Court does, that the word "appropriate" is ambiguous, *ante,* at 683, then I would think it necessary to examine the legislative history of each statute in which the word has been used in order to ascertain its meaning. The Court, however, relying on the legislative history of one statute, § 307(f)—which actually points in the other direction—concludes that all 16 other statutes limit fee awards to prevailing parties. *Ante,* at 682–683, n. 1.

[14] See 3 Legislative History of the Clean Air Amendments of 1977 (Committee Print compiled for the Senate Committee on Environment and Public Works by the Library of Congress), Ser. No. 95–16, p. 688 (1978) (1977 Leg. Hist.). See 5 *id.*, at 3644 (S. 252, introduced Jan. 14, 1977); 122 Cong. Rec. 23834 (1976) (remarks of Sen. Buckley). Written comments submitted to the Senate Committee on behalf of the Edison Electric Institute observed that the fees provision of S. 252, limited to parties that prevailed at least in part, was "less sweeping" than language in S. 253, which would "permit the court to award costs of litigation whenever it feels such award is appropriate." 5 1977 Leg. Hist., at 4146–4147. Before reporting S. 252 to the Senate floor, the Committee struck out the "prevailing party" language and substituted the "appropriate" test. 3 *id.*, at 573–575, 688.

The Clean Air Act Amendments passed by the Senate the previous year, S. 3219, had similarly required an award of fees for prevailing parties and further provided that, in any case "in which such party prevails in part, the court shall have discretion to award such reasonable costs." S. 3219, § 35, 94th Cong., 2d Sess. (1976), 6 1977 Leg. Hist., at 4689. At conference, The Senate Report explained that, under the different provision the Committee had chosen to adopt, fees and costs may be awarded "whenever the court determines that such an award is appropriate."[15] It is clear from the House Report that the language of § 307(f), "whenever [the court] determines that such an award is appropriate," was intended to be broader than a "prevailing party" standard:

> "In the case of the section 307 judicial review litigation, the purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest. *The committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the 'prevailing party'.* In fact, such an amendment was expressly rejected by the committee, largely on the grounds set forth in *NRDC* v. *EPA*, 484 F. 2d 1331, 1388 (1st Cir. 1973)." H. R. Rep. No. 95-294, p. 337 (1977), 4 1977 Leg. Hist., at 2804 (emphasis supplied).[16]

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however, the House version—providing for an award of fees in "appropriate" cases—was adopted. H. R. Conf. Rep. No. 94-1742, pp. 115-116 (1976), 5 1977 Leg. Hist., at 4400-4401; *id.*, at 6071 (text of conference bill, H. R. 10498). The conference bill was not enacted by Congress in 1976, but the 1976 legislative history buttresses the conclusion that Congress consciously chose the "appropriate" standard rather than the "prevailing party" standard when it enacted amendments to the Clean Air Act a year later.

[15] S. Rep. No. 95-127, p. 99 (1977), 3 1977 Leg. Hist., at 1473; see *ibid.* ("a court may, in its discretion, award costs of litigation to a party bringing a suit under section 307 of the Clean Air Act"); *id.*, at 9, 3 1977 Leg. Hist., at 1383 ("Section 307 is amended to give courts the discretion to award attorneys' fees when they deem such action is appropriate"). The Conference Report merely tracks the language of the statute. See H. R. Conf. Rep. No. 95-564, pp. 176-177 (1977), 3 1977 Leg. Hist., at 556-557.

[16] The Report added: "In adopting this provision concerning fees, the committee intended to meet the requirement for specific authorization im-

The cited portion of the opinion of the First Circuit in *Natural Resources Defense Council, Inc.* v. *EPA*, 484 F. 2d 1331, 1338 (1973),[17] sets forth the test of whether the party seeking fees has contributed to the goals of the environmental statute—a different test from whether it has prevailed. Judge Campbell wrote:

> "The authorizing language of § 304(d) permits an award 'to any party, whenever the court determines such award is appropriate.' This suggests greater latitude even than is found in 28 U. S. C. § 2412, which authorizes awards to 'the prevailing party'. We are at liberty to consider not merely 'who won' but what benefits were

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posed by 28 U. S. C. sec. 2412 and by the Supreme Court's ruling in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975)." H. R. Rep. No. 95–294, at 337, 4 1977 Leg. Hist., at 2804. The entire passage appeared in identical form in the House Report regarding the Clean Air Act amendments passed by the House in 1976. H. R. Rep. No. 94–1175, p. 277 (1976), 7 1977 Leg. Hist., at 6826.

The majority places considerable weight on the statement made in a Staff Report that language actually adopted in § 307(f) was "narrower" than the rejected formulation. *Ante*, at 691. If the Staff Report was actually referring to § 307(f), its view would be inconsistent with the position of the House Committee, surely a more reliable source of congressional intent. But in fact, I think the majority misinterprets the Staff Report, which stated:

> "The conference report [§ 307(f)] contained a narrower House provision. It authorized but did not require, courts to award reasonable attorneys fees to any party against whom EPA acted unreasonably in initiating an enforcement action. The award of attorneys fees was also authorized in judicial review proceedings brought under section 307 of the Clean Air Act." Section-by-Section Analysis of S. 252 and S. 253, Prepared by the Staff of the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, Ser. No. 95–1, p. 37 (Comm. Print 1977), 5 1977 Leg. Hist., at 3893.

The "narrower House provision" seems to be the provision for awarding fees to the targets of unreasonable EPA enforcement actions. This section was codified as part of § 113(b), 42 U. S. C. § 7413(b) (1976 ed., Supp. V)—not as part of § 307(f). See 5 1977 Leg. Hist., at 4354.

[17] It is apparent that the citation of page 1388 instead of 1338 is a typographical error.

> conferred. The purpose of an award of costs and fees is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals. When the government is attempting to carry out a program of such vast and unchartered dimensions, there are roles for both the official agency and a private watchdog. The legislation is itself novel and complex. Given the implementation dates, its early interpretation is desirable. It is our impression, overall, that petitioners, in their watchdog role, have performed a service." *Ibid.*

In the *NRDC* case the party receiving the fee award had prevailed on some issues. The court noted that even those challenges that were "not sustained, were mainly constructive and reasonable." *Ibid.*[18] Today the majority seizes on this fact in an attempt to explain away the clear intention stated in the Senate Report. But the Committee adopted the reasoning, not the facts, of the opinion in *NRDC* v. *EPA*.

IV

Unpersuaded by the statutory language and legislative history, the Court relies heavily on two other propositions. First, it notes, the doctrine of sovereign immunity requires that any statute authorizing the payment of fees and costs by the United States must be strictly construed. *Ante*, at 685–686. But this general statement does little to support the Court's position in this case. Congress clearly intended to authorize fees in certain circumstances, see n. 16, *supra*, and left it to the courts to ascertain which cases would be "appropriate."[19] Second, the majority finds the relation between § 307(f) and § 304(d), a similarly worded Clean Air Act provision enacted in 1970, to be "instructive." *Ante*, at 691.[20] I do not share the majority's interpretation of the significance of § 304(d).

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[18] Earlier in the opinion, Judge Campbell wrote that, as a result of petitioners' citizen suit, "policies of the EPA have been corrected and others, upheld, have been removed from the arena of dispute. . . . [S]ome of the legal principles at issue have national as well as regional import. Petitioners have thus helped to enforce, refine and clarify the law. They can be said to have assisted the EPA in achieving its statutory goals." 484 F. 2d, at 1334.

As originally proposed in 1970, § 304(d) provided for attorney's fee awards "whenever the court determines such action is in the public interest."[21] The Senate Report on that provision explained that the Committee intended to give courts the authority to award costs to defendants who had been harassed by frivolous litigation, and also to compensate citizens who performed a public service by bringing actions that successfully caused the defendant to abate an environmental violation "before a verdict is issued."[22] Subsequently the language was changed from "in the public interest" to "appropriate," without any apparent change in meaning.

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[19] Thus our discussion in *Indian Towing Co.* v. *United States*, 350 U. S. 61, 69 (1955), is fully apposite here: "Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-appointed guardian of the Treasury import immunity back into a statute designed to limit it." See *Canadian Aviator, Ltd.* v. *United States*, 324 U. S. 215, 222–226 (1945) (refusing to interpret an Act authorizing suits against the United States as narrowly as the Government suggested, because "we think Congressional adoption of broad statutory language authorizing suit was deliberate and is not to be thwarted by an unduly restrictive interpretation").

[20] Section § 304(d), 42 U. S. C. § 7604(d) (1976 ed. and Supp. V), provides for fee awards in citizens' suits brought in federal district court against alleged violators or against the EPA Administrator seeking enforcement of the Clean Air Act:

"The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."

[21] S. 4358, § 304(d), 91st Cong., 2d Sess. (1970), 1 Legislative History of the Clean Air Amendments of 1970 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93–18, pp. 705–706 (1974).

[22] "The Committee has added a key element in providing that the courts may award costs of litigation, including reasonable attorney and expert

It by no means follows, however, that Congress intended, by using the word "appropriate," to assure only that successful parties in these two situations would be eligible for fees.[23] Indeed, such an interpretation is contradicted by the open-ended language used to describe § 304(d) in the section-by-section analysis in the same Senate Report. The Committee specifically stated: "The court may award costs of litigation to either party whenever the court determines such an award is in the public interest without regard to the outcome of the litigation." S. Rep. No. 91–1196, p. 65 (1970). The fact that attorney and expert witness fees were treated alike in § 304(d) corroborates this interpretation of the 1970 Act. A true expert witness can often provide valuable assistance to the finder of fact, even if the expert's ultimate conclusion is rejected or the party who offered the expert's testimony does not prevail.

When the 1977 Act was passed, Congress made clear that the courts had the power to award fees and costs in actions brought in the courts of appeals under § 307 as well as those filed in district courts under § 304.[24] As its citation to the

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witness fees, whenever the court determines that such action is in the public interest. The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing. This should have the effect of discouraging abuse of this provision, while at the same time encouraging the quality of the actions that will be brought.

"The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party. This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions." S. Rep. No. 91–1196, p. 38 (1970).

[23] Cf. *United States* v. *Turkette*, 452 U. S. 576, 591 (1981).

[24] The word "appropriate," however, may well have different meanings in § 304 suits, which serve the primary function of aiding in the abatement of

1973 *NRDC* opinion demonstrates, it also took into account post-1970 judicial developments in attorney's fees law. By 1977, if not before 1970, the case law had made clear that the authority to award fees to "prevailing parties" included the two situations specifically mentioned in the 1970 legislative history.[25] It was therefore not necessary to go beyond the

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air pollution by stimulating *enforcement* of standards and regulations under the Clean Air Act, and in § 307 suits, which challenge the *validity* of air pollution standards promulgated by the agency. The reference in the 1970 legislative history to abatement of a violation before judgment in litigation, for example, has no direct applicability to § 307 actions seeking judicial review. In addition, private parties may be defendants in § 304 actions but not in § 307 judicial review proceedings. I do not believe it would be appropriate for a court to require a *private* defendant to pay the attorney's fees of an unsuccessful plaintiff in a § 304 suit, and of course, the possibility would never arise in a § 307 action. Thus, the Court's discussion, *ante*, at 691–692, has the same heroic quality as Don Quixote's defense against the charge of the windmills.

[25] Petitioner concedes that, before and during 1977, "prevailing parties" included plaintiffs who obtained favorable settlements rather than litigated judgments. See Brief for Petitioner 20–21, n. 13 (citing four 1976 civil rights cases, three FOIA cases decided in 1976 and one in 1977). Indeed, even before the 1970 Act was passed, the "prevailing party" standard had not always been construed narrowly to exclude such plaintiffs. See *Parham* v. *Southwestern Bell Tel. Co.*, 433 F. 2d 421, 429–430 (CA8 1970) (plaintiff whose Title VII suit acted as a "catalyst" prompting the defendant company to change its discriminatory employment policies was entitled to attorney's fees as a "prevailing party" even though he received no individual remedy and no injunctive relief was granted to the class); *Corcoran* v. *Columbia Broadcasting System, Inc.*, 121 F. 2d 575, 576 (CA9 1941) (under copyright statute, limiting attorney's fees to a "prevailing party," the court had power to allow fees when the defendant obtained a court order for the clarification of the complaint and the plaintiff then voluntarily dismissed without amending his pleading).

The majority suggests, however, that Congress decided not to adopt the "prevailing party" standard because it was aware of cases denying "prevailing party" status unless the plaintiff had prevailed "as to a substantial part of the litigation" or had succeeded on the "central issue." *Ante*, at 688. But the House Report's citation of *Natural Resources Defense Council, Inc.* v. *EPA*, 484 F. 2d 1331 (CA1 1973), casts doubt on that contention.

"prevailing parties" standard to achieve the result petitioner now seeks to ascribe to Congress in 1977. Moreover, the "appropriate" standard in § 304(d) itself had been construed more broadly to permit awards to nonprevailing parties.[26]

The majority's position is simple but illogical: Congress in 1977 used the term "whenever [the court of appeals] determines that such an award is appropriate" to mean when the plaintiff is a "prevailing party" or "partially prevailing party." *Ante*, at 689. It would have been much simpler for Congress to use the language "prevailing party" and "partially prevailing party" if that is precisely what it meant. Instead, it expressly rejected such language,[27] which it had previously used in countless other statutes, see n. 12, *supra*, and chose to authorize the court to award fees "whenever it determines that such an award is appropriate."

Accordingly, I cannot agree with the Court's interpretation of the statutory language. Congress decided that in exceptional circumstances it might be "appropriate" to award attorney's fees to nonprevailing parties. Of course, as the Court of Appeals recognized, it would be unreasonable to presume, against the background of attorney's fees statutes generally, that Congress intended fees to be awarded to every nonprevailing party who has litigated a nonfrivolous challenge to an EPA regulation. See 217 U. S. App. D. C., at 183, n. 4, 185, 189, n. 10, 672 F. 2d, at 36, n. 4, 38, 42,

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[26] See, *e. g., Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.*, 62 F. R. D. 353, 355 (Del. 1974) (acknowledging the power to award such fees but exercising discretion not to make such an award in that case), aff'd, 510 F. 2d 969 (CA3 1975); *Citizens Assn. of Georgetown* v. *Washington*, 383 F. Supp. 136, 143–146 (DC 1974), rev'd on other grounds, 175 U. S. App. D. C. 356, 535 F. 2d 1318 (1976).

[27] To the extent that Congress wished to respond to the concerns expressed by the Chamber of Commerce and the Natural Resources Defense Council, see *ante*, at 690, n. 11, it could simply have amended S. 252 to give courts discretion to award fees and costs to prevailing and partially prevailing parties.

n. 10. The degree of success or failure should certainly be weighed in the balance to determine whether it is appropriate to require the Government to bear its adversary's costs of litigation. In my view it would be an abuse of discretion for the Court of Appeals to award fees to a nonprevailing party unless its contribution to the process of judicial review, or to the implementation of the Act by the agency, had truly been substantial and had furthered the goals of the Clean Air Act.

As the Court of Appeals recognized in this case, § 307(f) requires the court to consider the importance, novelty, and complexity of the issues raised by the party seeking fees and costs. A fee award might well be inappropriate if the party had challenged an agency decision of narrow applicability,[28] or if the party's contentions, though nonfrivolous, were relatively weak. In addition to the importance of the issues litigated by the party seeking attorney's fees, it would be appropriate for the court to consider whether the party had an economic incentive to participate in litigation because it stood to gain substantial economic benefits. If so, an award of fees would be inconsistent with congressional intent. Further, § 307(f), properly construed, permits the court of appeals to take into account the degree of technical and legal assistance the party provided to the court in its evaluation of the case. The court of appeals is in the best position to make these determinations, because it is uniquely familiar with the circumstances of each case. In order to assure a reasonable exercise of discretion, it should be required to explain with some care—as the Court of Appeals has done in this case—why it deems an award of fees to a nonprevailing party to be "appropriate."

Regardless of our views about the wisdom of the choice Congress made, we have a plain duty to accept it. *TVA* v.

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[28] Section 307 applies not only to nationwide rules imposing potential costs of billions of dollars, such as the sulfur dioxide standards in this case, but also to a variety of other regulations, revisions of regulations, implementation plans, and orders. 42 U. S. C. § 7607(d)(1) (1976 ed., Supp. V).

Hill, 437 U. S. 153, 194–195 (1978). Congress consciously selected a particular course: that a party who seeks judicial review of an EPA regulation may be entitled to compensation from the Government, when the court deems it "appropriate," even if the reviewing court determines that there is no ground for disturbing the agency's conclusions. I would construe this category of "appropriate" cases to be narrow; it is wrong, however, to read it out of the statute altogether. It is not the function of the courts to "sit as a committee of review, nor are we vested with the power of veto." *Ibid.*[29]

I therefore respectfully dissent.

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[29] This case is the mirror image of *Alyeska Pipeline*, where we noted that "it is not for us to invade the Legislature's province by redistributing litigation costs in the manner suggested by respondents . . . ." 421 U. S., at 271. Here, it is not for us to invade the Legislature's province by refusing to distribute litigation costs in the manner clearly contemplated by the 95th Congress in 1977.

RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA *v.* REHNER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82–401. Argued March 21, 1983—Decided July 1, 1983

Respondent is a federally licensed Indian trader who operates a general store on an Indian reservation in California. When she was refused an exemption from California's law requiring a state license in order to sell liquor for off-premises consumption, respondent filed suit in Federal District Court seeking a declaratory judgment that she did not need a state license. The District Court dismissed the suit, holding that respondent was required to have a state license under 18 U. S. C. § 1161, which provides that liquor transactions in Indian country are not subject to prohibition under federal law if such transactions are "in conformity both with the laws of the State in which [they] occu[r] and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country." The Court of Appeals reversed, holding that § 1161 pre-empts state licensing and distribution jurisdiction over tribal liquor sales in Indian country.

Held: California may properly require respondent to obtain a state license in order to sell liquor for off-premises consumption. Pp. 718–735.

(a) There is no tradition of tribal sovereign immunity or inherent self-government in favor of liquor regulation by Indians. Although in Indian matters Congress usually acts "upon the assumption that the States have no power to regulate the affairs of Indians on a reservation," *Williams* v. *Lee*, 358 U. S. 217, 220, that assumption is unwarranted in the narrow context of liquor regulation. In addition to the congressional divestment of tribal self-government in this area, the States have also been permitted, and even required, to impose liquor regulations. The tradition of concurrent state and federal jurisdiction over the use and distribution of alcoholic beverages in Indian country is justified by the relevant state interests. Here, respondent's distribution of liquor has a significant impact beyond the limits of the reservation, and the State, independent of the Twenty-first Amendment, has an interest in the liquor traffic within its borders. Pp. 720–725.

(b) Title 18 U. S. C. § 1161 authorized, rather than pre-empted, state regulation of Indian liquor transactions. It is clear from the face of the statute and its legislative history both that Congress intended to remove federal prohibition on the sale and use of liquor imposed on Indians and that Congress intended state laws would apply of their own force to govern tribal liquor transactions as long as the tribe itself approved these transactions by enacting an ordinance. Congress contemplated that its absolute but not exclusive power to regulate Indian liquor transactions would be delegated to the tribes themselves, and to the States, which historically shared concurrent jursidiction with the Federal Government. Because of the lack of tradition of tribal self-government in the area of liquor regulation, it is not necessary that Congress indicate expressly that the State has jurisdiction to license and distribute liquor. This Court will not apply the canon of construction that state laws generally are not applicable to Indians on a reservation except where Congress has expressly provided that state laws shall apply, when application would be tantamount to a formalistic disregard of congressional intent. Thus, application of the state licensing scheme here does not impair a right granted or reserved by federal law, but, on the contrary, is specifically authorized by Congress and does not interfere with federal policies concerning the reservation. Pp. 725–735.

678 F. 2d 1340, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 735.

Alan S. Meth, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *John K. Van De Kamp*, Attorney General, and *George Deukmejian*, former Attorney General.

Stephen V. Quesenberry argued the cause for respondent. With him on the brief were *David J. Rapport* and *Charles Scott*.

Joshua I. Schwartz argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Lee, Assistant Attorney General Dinkins, Robert L. Klarquist*, and *Anne S. Almy*.*

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*Briefs of *amici curiae* urging reversal were filed by *Warren Spannaus*, Attorney General of Minnesota, and *James M. Schoessler*, Special Assistant Attorney General, *David Albert Mustone, Tom D. Tobin, Mark V. Meierhenry*, Attorney General of South Dakota, *Robert L. Timm*, Chief Deputy Attorney General, and *Harold F. X. Purnell* for the State of Minnesota et al.; by *Michael T. Greely*, Attorney General of Montana, and

JUSTICE O'CONNOR delivered the opinion of the Court.

The question presented by this case is whether the State of California may require a federally licensed Indian trader, who operates a general store on an Indian reservation, to obtain a state liquor license in order to sell liquor for off-premises consumption. Because we find that Congress has delegated authority to the States as well as to the Indian tribes to regulate the use and distribution of alcoholic beverages in Indian country,[1] we reverse the judgment of the Court of Appeals for the Ninth Circuit.

I

The respondent Rehner is a federally licensed Indian trader[2] who operates a general store on the Pala Reservation in San Diego, Cal. The Pala Tribe had adopted a tribal ordinance

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Helena S. Maclay and *Deirdre Boggs*, Special Assistant Attorneys General, for the State of Montana; and by *James M. Goldberg* for the National Alcoholic Beverage Control Association.

Briefs of *amici curiae* urging affirmance were filed by *Art Bunce* for the Agua Caliente Band of Cahuilla Indians; by *George E. Fettinger* and *Kathleen A. Miller* for the Mescalero Apache Tribe; by *Kim Jerome Gottschalk* for the Pala Band of Mission Indians; by *Harry R. Sachse* for the Shoshone Tribe of the Wind River Indian Reservation et al.; and by *Douglas L. Bell*, *Allen H. Sanders*, and *Jeffrey Schuster* for the Tulalip and Muckleshoot Indian Tribes.

[1] Title 18 U. S. C. § 1151 defines "Indian country" as "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

[2] There is some confusion among the parties and *amici* as to whether the court below held that the tribes had exclusive jurisdiction over the licensing and distribution of liquor on reservations irrespective of the identity of the vendor. Although we acknowledge that the decision below is somewhat ambiguous in this respect, we construe the opinion as applying only to vendors, like Rehner, who are members of the governing tribe.

permitting the sale of liquor on the reservation providing that the sales conformed to state law, and this ordinance was approved by the Secretary of the Interior. See 25 Fed. Reg. 3343 (1960). Rehner then sought from the State an exemption from its law requiring a state license for retail sale of distilled spirits for off-premises consumption.[3] When she was refused an exemption, Rehner filed suit seeking a declaratory judgment that she did not need a license from the State, and an order directing that liquor wholesalers could sell to her. The District Court granted the State's motion to dismiss, ruling that Rehner was required to have a state license under 18 U. S. C. § 1161, which provides that liquor transactions in Indian country are not subject to prohibition under federal law provided those transactions are "in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country . . . ."[4]

The Court of Appeals reversed the District Court, holding that § 1161 did not confer jurisdiction on the States to require liquor licenses. The court held that "18 U. S. C. § 1161 preempts state licensing and distribution jurisdiction over tribal liquor sales in Indian country." 678 F. 2d 1340, 1351 (1982).[5]

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[3] The California licensing scheme is found in Cal. Bus. & Prof. Code Ann. § 23000 *et seq.* (West 1964 and Supp. 1983).

[4] Section 1161 provides in full:

"The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register."

[5] Rehner appealed to the Court of Appeals for the Ninth Circuit, and, before a three-judge panel of that court rendered a decision on the appeal, two more cases arose presenting similar issues. The Ninth Circuit then scheduled argument en banc for all three cases. The companion cases were *Muckleshoot Indian Tribe* v. *Washington*, No. 79-4403, and *Tulalip Tribes* v. *Washington*, No. 79-4404 (CA9). These cases involved, *inter*

In deciding the pre-emption issue, the court focused on two aspects of § 1161. First, it held that "there is insufficient evidence to show that Congress intended section 1161 to confer on the states regulatory jurisdiction over on-reservation liquor traffic." *Id.*, at 1343. The court reasoned that the liquor transactions at issue were governed exclusively by federal law, and that if Congress wished to remove "its veil of preemption," it needed to do so by an express statement that the State had jurisdiction to impose its licensing requirement. *Ibid.* Second, the court held that "section 1161 has preemptive effect" because Congress provided for tribal ordinances that were to be certified by the Secretary of the Interior and published in the Federal Register. *Id.*, at 1348–1349, 1349, n. 18. In this way, "the regulatory authority of the tribes . . . was safeguarded by federal supervision." *Id.*, at 1349.[6]

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alia, state sales taxes imposed on reservation liquor transactions, an issue not discussed or relied upon by the court below in this case. The court remanded these two companion cases to the District Court in the light of *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134 (1980).

[6] The court also rejected the argument, made by one of the parties in the companion cases, that the Twenty-first Amendment permitted the States to exercise regulatory jurisdiction over liquor transactions on reservations. Because we base our holding on § 1161, we do not reach the issue whether the Twenty-first Amendment permits the State to exercise jurisdiction over liquor transactions on reservations. We also do not consider whether the State effectively has authority to regulate licensing and distribution of liquor transactions on reservations under any other statute. See 28 U. S. C. § 1360 (1976 ed. and Supp. V); 18 U. S. C. § 1162. At oral argument, both Rehner's attorney and counsel for the United States as *amicus curiae* suggested that the State had broad powers to enforce "substantive" state liquor laws on reservations through 18 U. S. C. § 1162. See Tr. of Oral. Arg. 31–32, 40. See n. 18, *infra*.

Finally, we reject Rehner's suggestion that this case has become moot because California now permits wholesalers to sell to unlicensed persons on Indian reservations. See Cal. Bus. & Prof. Code Ann. § 23384 (West Supp. 1983). At oral argument, the State confirmed that despite this statutory change, the licensing requirement is still in effect. Tr. of Oral Arg. 19.

II

The decisions of this Court concerning the principles to be applied in determining whether state regulation of activities in Indian country is pre-empted have not been static. In *Worcester* v. *Georgia*, 6 Pet. 515, 560 (1832), Chief Justice Marshall wrote that an Indian reservation "is a distinct community, occupying its own territory, with boundaries accurately described, in which [state laws] can have no force . . . ." Despite this early statement emphasizing the importance of tribal self-government, "Congress has to a substantial degree opened the doors of reservations to state laws, in marked contrast to what prevailed in the time of Chief Justice Marshall," *Organized Village of Kake* v. *Egan*, 369 U. S. 60, 74 (1962). "[E]ven on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148 (1973).

Although "[f]ederal treaties and statutes have been consistently construed to reserve the right of self-government to the tribes," F. Cohen, Handbook of Federal Indian Law 273 (1982 ed.) (hereafter Cohen), our recent cases have established a "trend . . . away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption." *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 172 (1973) (footnote omitted). The goal of any pre-emption inquiry is "to determine the congressional plan," *Pennsylvania* v. *Nelson*, 350 U. S. 497, 504 (1956), but tribal sovereignty may not be ignored and we do not necessarily apply "those standards of pre-emption that have emerged in other areas of the law." *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 143 (1980). We have instead employed a pre-emption analysis that is informed by historical notions of tribal sovereignty, rather than determined by them. "[C]ongressional authority and the 'semi-independent position' of Indian tribes . . . [are] two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." *Bracker*, 448 U. S., at 142. Although "[t]he right of tribal self-government is ultimately dependent on and subject to the broad power of Congress," *id.*, at 143, we still employ the tradition of Indian sovereignty as a "backdrop against which the applicable treaties and federal statutes must be read" in our pre-emption analysis. *McClanahan, supra*, at 172. We do not necessarily require that Congress explicitly pre-empt assertion of state authority insofar as Indians on reservations are concerned, but we have recognized that "any applicable regulatory interest of the State must be given weight" and "'automatic exemptions "as a matter of constitutional law"' are unusual." *Bracker, supra*, at 144 (quoting *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463, 481, n. 17 (1976)).

The role of tribal sovereignty in pre-emption analysis varies in accordance with the particular "notions of sovereignty that have developed from historical traditions of tribal independence." *Bracker, supra*, at 145. These traditions themselves reflect the "accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 156 (1980). However, it must be remembered that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Id.*, at 154. "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and *is subject to complete defeasance*." *United States* v. *Wheeler*, 435 U. S. 313, 323 (1978) (emphasis added). See also *Confederated Tribes, supra*, at 178–179 (opinion of REHNQUIST, J.).

When we determine that tradition has recognized a sovereign immunity in favor of the Indians in some respect, then we usually are reluctant to infer that Congress has authorized the assertion of state authority in that respect "'except where Congress has expressly provided that State laws shall apply.'" *McClanahan, supra*, at 171 (quoting U. S. Dept. of the Interior, Federal Indian Law 845 (1958) (hereafter Indian Law)). Repeal by implication of an established tradition of immunity or self-governance is disfavored. *Bryan* v. *Itasca County*, 426 U. S. 373, 392 (1976). If, however, we do not find such a tradition, or if we determine that the balance of state, federal, and tribal interests so requires, our pre-emption analysis may accord less weight to the "backdrop" of tribal sovereignty. See *Confederated Tribes, supra*, at 154–159; *Mescalero Apache Tribe, supra.*

A

We first determine the nature of the "backdrop" of tribal sovereignty that will inform our pre-emption analysis. The "backdrop" in this case concerns the licensing and distribution of alcoholic beverages, and we must determine whether there is a tradition of tribal sovereign immunity that may be repealed only by an explicit directive from Congress.

We begin by noting that there is nothing in the record to indicate that a federally licensed Indian trader like Rehner may sell liquor for off-premises consumption only to members of the Pala Tribe. Indeed, the State contends, and Rehner does not dispute, that Rehner, or any other federally licensed trader, may sell liquor to Indian and non-Indian buyers alike. See Brief for Petitioner 81; Tr. of Oral Arg. 14. To the extent that Rehner seeks to sell to non-Indians, or to Indians who are not members of the tribe with jurisdiction over the reservation on which the sale occurred, the decisions of this Court have already foreclosed Rehner's argument that the licensing requirements infringe upon tribal sovereignty.[7]

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[7] In *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976), we held that a State may impose a nondiscriminatory tax on non-Indian customers of Indian retailers who conducted their businesses on the reservation, and that the State may require that the Indian retailer enforce and collect this tax. We upheld the tax on non-Indians in *Moe* even though we recognized that

If there is any interest in tribal sovereignty implicated by imposition of California's alcoholic beverage regulation, it exists only insofar as the State attempts to regulate Rehner's sale of liquor to other members of the Pala Tribe on the Pala Reservation. The only interest that Rehner advances in this regard is that freedom to regulate alcoholic beverages is important to Indian self-governance. To the extent California limits the absolute number of licenses that it distributes, state regulation may effectively preclude this aspect of self-governance. See Brief for Respondent 63–74. Rehner relies on our statement in *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975), that the distribution and use of intoxicants is a "matte[r] that affect[s] the internal and social relations of tribal life."

Rehner's reliance on *Mazurie* as establishing tribal sovereignty in the area of liquor licensing and distribution is misplaced. In *Mazurie*, we held that "independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of *[Congress'] own authority*" to regulate commerce with the Indians. *Ibid.* (emphasis

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in "'the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation . . . .'" *Id.*, at 475–476 (quoting *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148 (1973)). In *Confederated Tribes*, we said of the tax upheld in *Moe* that "[s]uch a tax may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians. . . . [because] the Tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all." 447 U. S., at 151, and n. 27. In *Confederated Tribes*, we also held that Indians resident on the reservation but nonmembers of the governing tribe "stand on the same footing as non-Indians resident on the reservation" insofar as imposition of tax on cigarette sales is concerned. *Id.*, at 161. Regulation of sales to non-Indians or nonmembers of the Pala Tribe simply does not "contravene the principle of tribal self-government," *ibid.*, and, therefore, neither Rehner nor the Pala Tribe has any special interest that militates against state regulation in this case, providing that Congress has not pre-empted such regulation.

added). We expressly declined to base our holding on whether "independent [tribal] authority *is itself* sufficient for the tribes to impose" their own liquor regulations. *Ibid.* (emphasis added).

The reason that we declined is apparent in the light of the history of federal control of liquor in this context, which must be characterized as "one of the most comprehensive [federal] activities in Indian affairs . . . ." Cohen, at 307. Unlike the authority to tax certain transactions on reservations that we have characterized as "a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status," *Confederated Tribes*, 447 U. S., at 152, tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians. The colonists regulated Indian liquor trading before this Nation was formed, and Congress exercised its authority over these transactions as early as 1802. See Indian Law, at 381. Congress imposed complete prohibition by 1832, and these prohibitions are still in effect subject to suspension conditioned on compliance with state law and tribal ordinances.[8]

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[8] As Cohen notes: "Restriction on traffic in liquor with the Indians began in early colonial times. The tribes themselves at various times have sought to control liquor use, and it is worthy of note that the first federal control measure was enacted, at least in part, in response to the verbal plea of an Indian chief to President Jefferson in 1802. That measure was not a criminal law and depended on civil regulation of trafficking. The first prohibitions were enacted in 1822 and 1832, monetary penalties were added in the Trade and Intercourse Act of 1834, and imprisonment was added in 1862.

"Since 1834 federal law has specifically penalized both the introduction of liquor into Indian country and the operation of a distillery therein. Possession of liquor in Indian country has been a separate crime since 1918. . . .

"The 1834 Act also prohibited selling (or otherwise conveying) liquor to an Indian in Indian country; the 1862 replacement of this statute broadened the sale prohibition to include all Indians under the superintendence of a

Although in Indian matters Congress usually acts "upon the assumption that the States have no power to regulate the affairs of Indians on a reservation," *Williams* v. *Lee*, 358 U. S. 217, 220 (1959), that assumption would be unwarranted in the narrow context of the regulation of liquor. In addition to the congressional divestment of tribal self-government in this area, the States have also been permitted, and even required, to impose regulations related to liquor transactions. As a condition of entry into the United States, Arizona, New Mexico, and Oklahoma were required by Congress to enact prohibitions against the sale of liquor to Indians and introduction of liquor into Indian country.[9] Several States, including California, pursuant to state police power, long prohibited liquor transactions with Indians.[10] These state prohibitions indicate that "'absolute' federal jurisdiction is not invariably exclusive jurisdiction." *Kake Village*, 369 U. S., at 68. Indeed, we have recognized expressly that "[t]he federal prohibition against taking intoxicants into this Indian colony does not deprive the State of Nevada of its sovereignty over the area in question. The Federal Government does not assert

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federal agent, even outside Indian country. This provision is still in the code as part of 18 U. S. C. § 1854, but is confined to Indian country by 18 U. S. C. § 1161 and can be conditionally suspended by enactment of a tribal ordinance pursuant to the latter section." Cohen, at 306–307 (footnotes omitted).

[9] See Ariz. Const., Art. 20, ¶ 3 (prohibition removed in 1954); N. M. Const., Art. XXI, § 1 (1911) (prohibition removed in 1953); Okla. Const., Art. I, § 7 (1907) (prohibition removed in 1959).

[10] See, *e. g.*, *State* v. *Rorvick*, 76 Idaho 58, 277 P. 2d 566 (1954); *State* v. *Lindsey*, 133 Wash. 140, 233 P. 327 (1925); *Dagan* v. *State*, 162 Wis. 353, 156 N. W. 153 (1916); *State* v. *Justice*, 44 Utah 484, 141 P. 109 (1914); *State* v. *Mamlock*, 58 Wash. 631, 109 P. 47 (1910); *People* v. *Gebhard*, 151 Mich. 192, 115 N. W. 54 (1908); *Tate* v. *State*, 58 Neb. 296, 78 N. W. 494 (1899); *State* v. *Wise*, 70 Minn. 99, 72 N. W. 843 (1897); *People* v. *Bray*, 105 Cal. 344, 38 P. 731 (1894); *Territory* v. *Guyott*, 9 Mont. 46, 22 P. 134 (1889); *Territory* v. *Coleman*, 1 Ore. 191 (1855). See also G. Colby, Digest of the Excise Laws of Some of the States of the Union and Foreign Countries 9, 36, 43 (1888) (describing similar laws in Colorado, Missouri, and Nevada).

exclusive jurisdiction within the colony Enactments of the Federal Government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws *as conflict with the federal enactments.*" *United States* v. *McGowan*, 302 U. S. 535, 539 (1938) (footnote omitted; emphasis added).

This historical tradition of concurrent state and federal jurisdiction over the use and distribution of alcoholic beverages in Indian country is justified by the relevant state interests involved. See *Confederated Tribes*, *supra*, at 156. Rehner's distribution of liquor has a significant impact beyond the limits of the Pala Reservation. The State has an unquestionable interest in the liquor traffic that occurs within its borders, and this interest is independent of the authority conferred on the States by the Twenty-first Amendment. *Crowley* v. *Christensen*, 137 U. S. 86, 91 (1890). Liquor sold by Rehner to other Pala tribal members or to nonmembers can easily find its way out of the reservation and into the hands of those whom, for whatever reason, the State does not wish to possess alcoholic beverages, or to possess them through a distribution network over which the State has no control. This particular "spillover" effect is qualitatively different from any "spillover" effects of income taxes or taxes on cigarettes. "A State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention." *New Mexico* v. *Mescalero Apache Tribe*, 462 U. S. 324, 336 (1983).

There can be no doubt that Congress has divested the Indians of any inherent power to regulate in this area. In the area of liquor regulation, we find no "congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development." *Bracker*, 448 U. S., at 143 (footnote omitted). With respect to the regulation of liquor transactions, as opposed to the state income taxation involved in *McClanahan*, Indians cannot be said to "possess the usual accoutrements of tribal self-government." *McClanahan*, 411 U. S., at 167–168.

The court below erred in thinking that there was some *single* notion of tribal sovereignty that served to direct *any* pre-emption analysis involving Indians. See 678 F. 2d, at 1348.[11] Because we find that there is no tradition of sovereign immunity that favors the Indians in this respect, and because we must consider that the activity in which Rehner seeks to engage potentially has a substantial impact beyond the reservation, we may accord little if any weight to any asserted interest in tribal sovereignty in this case.

B

We must next determine whether the state authority to license the sale of liquor is pre-empted by federal law. *Bracker, supra,* at 142; *McClanahan, supra,* at 172. The court below held that § 1161 pre-empted state regulation of licensing and distribution, and that the reference to state law in § 1161 was not sufficiently explicit to permit application of the state licensing law.

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[11] The court stated that it did not reach the sovereignty issue in the light of its holding that § 1161 had pre-emptive effect. See 678 F. 2d, at 1348, and 1349, n. 18. However, the court did acknowledge that it was obligated "to incorporate the principle of tribal sovereignty into our preemption analysis." *Id.,* at 1348.

In dissent, JUSTICE BLACKMUN argues that the Court's analysis of tribal sovereignty has "*never* turned on whether the particular area being regulated is one traditionally within the tribe's control." *Post,* at 739 (emphasis in original). As support for this proposition, JUSTICE BLACKMUN relies on *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue of New Mexico,* 458 U. S. 832 (1982), *Moe* v. *Salish & Kootenai Tribes,* 425 U. S. 463 (1976), and *Mescalero Apache Tribe* v. *Jones,* 411 U. S. 145 (1973). These cases fail to support JUSTICE BLACKMUN's position. In *Ramah,* we held that federal law pre-empted state regulation. In *Moe,* we found that the state regulation was a taxing measure prohibited by federal statute. In *Mescalero Apache Tribe,* we held that the State could not impose a tax on personalty because it was "'permanently attached to the realty'. . . . [and] would certainly be immune from the State's ad valorem property tax." 411 U. S., at 158. Contrary to JUSTICE BLACKMUN's suggestion, none of these cases involved a situation where the Court recognized tribal immunity in a historical context in which the Indians were divested of the inherent power to regulate.

We disagree with both aspects of the court's analysis. As we explained in Part II–A above, the tribes have long ago been divested of any inherent self-government over liquor regulation by both the explicit command of Congress and as a "necessary implication of their dependent status." *Confederated Tribes*, 447 U. S., at 152. Congress has also historically permitted concurrent state regulation through the imposition of criminal penalties on those who supply Indians with liquor, or who introduce liquor into Indian country. Therefore, this is not a case in which we apply a presumption of a lack of state authority.

The presumption of pre-emption derives from the rule against construing legislation to repeal by implication some aspect of tribal self-government. See *Bryan* v. *Itasca County*, 426 U. S., at 391–392; *Morton* v. *Mancari*, 417 U. S. 535, 549–551 (1974). Because there is no aspect of exclusive tribal self-government that requires the deference reflected in our requirement that Congress expressly provide for the application of state law, we have only to determine whether application of the state licensing laws would "impair a right granted or reserved by federal law." *Mescalero Apache Tribe*, 411 U. S., at 148; *Kake Village*, 369 U. S., at 75. Our examination of § 1161 leads us to conclude that Congress authorized, rather than pre-empted, state regulation over Indian liquor transactions.

The legislative history of § 1161 indicates both that Congress intended to remove federal prohibition on the sale and use of alcohol imposed on Indians in 1832, and that Congress intended that state laws would apply of their own force to govern tribal liquor transactions as long as the tribe itself approved these transactions by enacting an ordinance. It is clear that by 1953, federal law curtailing liquor traffic with the Indians came to be "viewed as discriminatory." Indian Law, at 382. As originally introduced, the bill that was later to become § 1161 was intended only to "[t]o terminate Federal discriminations against the Indians of Arizona." See Hearings on H. R. 1055 before the Subcommittee on Indian

Affairs of the House Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. (Jan. 6, 1953) (Hearings), reprinted in App. to Brief for Petitioner A–4.[12] In hearings on this original bill, Representative Rhodes of Arizona, speaking on behalf of Representative Patten, who introduced the bill, stated that the sole purpose of the bill was to eliminate federal prohibition because it was discriminatory and had a detrimental effect on the Indians. He also commented that the bill would permit Arizona to amend its Constitution to remove the state prohibitions on sale of liquor to Indians and on introduction of liquor into Indian country. At these same hearings, Dillon S. Myer, Commissioner of the Bureau of Indian Affairs of the Department of the Interior, submitted a revision of the bill proposed by Representative Patten. This revision was different from the original bill in a number of respects, the most important of which for present purposes is that the revision applied to *all* States, and not just to Arizona. In the context of discussing the bill, Commissioner Myer stated: "We certainly do not intend to try to revise State laws regarding Indians or anyone else, and it should be clear that is provided. . . . [The revision] is intended to eliminate all of the sections in the statutes which discriminate against Indians and at the same time not interfere with State laws, and at the same time provide opportunity for the tribes to have prohibition on the reservation if they wish to, if it is not covered by State law." *Id.*, at A–26—A–27.

In a later hearing, the Department of the Interior submitted an unofficial report in which it was again urged that federal Indian liquor prohibition be ended *generally*, and not just in Arizona, as long as liquor "transactions are in conformity with the ordinances of the tribes concerned and are not contrary to state law." See Hearings (May 6, 1953), reprinted in App. to Brief for Petitioner A–54. Representative D'Ewart read into the record a telegram sent by the

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[12] This hearing, as well as those hearings on May 6, 1953, and June 2, 1953, is not officially published, and all the hearings are reprinted in the petitioner's brief.

Chairman of the Navajo Tribal Council. The telegram indicated that the Navajo people supported the "anti-discrimination bill" as a measure to ensure "equal rights." *Id.*, at A–59.

Representative Patten, the sponsor of the original bill, stated that "if this bill were passed to remove all discrimination, the Indians would still have to comply with State law in every regard . . . ." See Hearings (June 2, 1953), reprinted in App. to Brief for Petitioner A–69. Representative Patten's remarks are particularly valuable in determining the meaning of § 1161. As the sponsor of the bill, Representative Patten's interpretation is an "'authoritative guide to the statute's construction.'" *Bowsher* v. *Merck & Co.*, 460 U. S. 824, 832 (1983) (quoting *North Haven Board of Education* v. *Bell*, 456 U. S. 512, 527 (1982).

The House Report explained the bill as eliminating discrimination caused by legislation "applicable only to Indians." H. R. Rep. No. 775, 83d Cong., 1st Sess., 2 (1953). It included an official report of the Department of the Interior stating that federal prohibition would be lifted only if liquor "transactions are in conformity with the ordinances of the tribes concerned and are not contrary to State law." *Id.*, at 3. The Senate Report also expressed these sentiments: "if this bill is enacted, a State or local municipality or Indian tribes, if they desire, by the enactment of proper legislation or ordinance, *to restrict the sales of intoxicants* to Indians, they may do so." S. Rep. No. 722, 83d Cong., 1st Sess., 1 (1953) (emphasis added).

It is clear then that Congress viewed § 1161 as abolishing federal prohibition, and as legalizing Indian liquor transactions as long as those transactions conformed both with tribal ordinances and state law. It is also clear that Congress contemplated that its absolute but not exclusive power to regulate Indian liquor transactions would be delegated to the tribes themselves, and to the States, which historically shared concurrent jurisdiction with the Federal Government in this area. Early administrative practice and our prior decision in *United States* v. *Mazurie*, 419 U. S. 544 (1975), confirm this understanding of § 1161.

As noted above, the Bureau of Indian Affairs of the Department of the Interior was heavily involved in drafting the revised bill that eventually became § 1161. In a 1954 administrative opinion, ironically rendered in response to California's interpretation of § 1161, the Department's Solicitor stated plainly that the Bureau contemplated that liquor transactions on reservations would be subject to state laws, including state licensing laws. Specifically, the Solicitor stated:

> "The fact that a tribe in California may by ordinance authorize the sale of liquor on its reservation in packages for consumption only off the premises where it is sold would not, in my opinion, impinge upon the foregoing authority of the State Board of Equalization to license sales of liquor on such reservation for consumption both on and off the premises where the liquor is sold. In such circumstances, if any person so licensed by the State were to sell liquor on the reservation for on-premises consumption in accordance with his license, presumably *he would be immune from State prosecution and, thus, the license issued by the State agency would be fully effective insofar as State law is concerned.*" Memo. Sol. M–36241 (Sept. 22, 1954), *Liquor—Tribal Ordinance Regulating Traffic Within Reservation*, 2 Op. Solicitor of Dept. of Interior Relating to Indian Affairs 1917–1974, pp. 1648, 1650 (emphasis added).

In the Department of the Interior's Indian Law, at 382–383, the Solicitor, citing the 1954 opinion, stated that "if a tribal ordinance permits only package sales on a reservation for consumption off the premises, a State license to sell for consumption on the premises will give protection *only against*

State prosecutions, but not against Federal prosecutions under section 1156." (Footnote omitted; emphasis added.)[13]

Both Rehner and the court below believed that § 1161 was merely an exemption from *federal* criminal liability, and affirmatively empowered neither Indian tribes nor the State to regulate liquor transactions. See 678 F. 2d, at 1345; Brief for Respondent 9. Our decision in *Mazurie, supra,* at 554, rejected this argument with respect to Indian tribes, and there is no reason to accept it with respect to the State. In *Mazurie* we held that in enacting § 1161 Congress intended to *delegate* to the tribes a portion of its authority over liquor transactions on reservations. Since we found this delegation on the basis of the statutory language requiring that liquor transactions conform "*both* with the laws of the State . . . and with an ordinance duly adopted" by the governing tribe (emphasis added), we would ignore the plain language of the statute if we failed to find this same delegation in favor of the States.[14] Rehner argues that *Mazurie* merely acknowledged that Indian tribes "possessed independent authority" over liquor transactions. Brief for Respondent 67. As we noted in the context of our discussion of the doctrine of tribal sovereignty, we expressly declined to base our holding in *Mazurie* on the doctrine of tribal self-government; rather, we held merely that the tribal authority was sufficient to protect the congressional decision to delegate licensing authority. See 419 U. S., at 557. It cannot be doubted that the State's police power over liquor transactions within its borders is broad enough to protect the same congressional decision in favor of the State.

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[13] Although administrative interpretation changed in 1971, see *Applicability of the Liquor Laws of the State of Montana on the Rocky Boy's Reservation*, 78 I. D. 39 (1971), it is clear that the early interpretation by the Bureau of Indian Affairs favors the State's position. As that early position is consistent with the view of Commisioner Myer, whose Bureau revised H. R. 1055, it is surely more indicative of congressional intent in 1953 than a 1971 opinion to the contrary.

In addition, we note that the 1971 opinion of the Solicitor appears to be based on his view that in *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965), we drew a distinction between state licensing requirements and state "substantive" liquor laws, and found only the latter to be applicable under § 1161. See 78 I. D., at 40, n. 1. In *Warren Trading Post Co.*, we actually described § 1161 as "permitting application of state liquor law standards within an Indian reservation under certain conditions." 380 U. S., at 687, n. 3. We fail to understand how our description of § 1161 in that opinion can be interpreted as creating a distinction between "substantive" and "regulatory" laws. To the extent that the Solicitor's new interpretation owes anything to our decision in *Warren Trading Post Co.*, we reject the interpretation.

In dissent, JUSTICE BLACKMUN accepts the distinction between substantive and licensing laws that he believes was articulated in *Warren Trading Post Co.* For the reasons explained in this note and n. 18, *infra*, JUSTICE BLACKMUN's arguments are not successful.

The thrust of Rehner's argument, and the primary focus of the court below, is that state authority in this area is preempted because such authority requires an express statement by Congress in the light of the canon of construction that we quoted in *McClanahan:* "'State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.'" 411 U. S., at 170–171 (quoting Indian Law, at 845). As we have established above, because of the lack of a tradition of self-government in the area of liquor regulation, it is not necessary that Congress indicate expressly that the State has jurisdiction to regulate the licensing and distribution of alcohol.[15]

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[14] Indeed, given the history of concurrent state jurisdiction and the tradition of complete prohibition imposed on the Indians, the delegation to the States is more readily apparent than the delegation to the tribes.

[15] This canon is based, in part, on the notion that we normally resolve any doubt in a pre-emption analysis in favor of the Indians because of their status as "'wards of the nation.'" *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 174 (1973) (quoting *Carpenter* v. *Shaw*, 280 U. S. 363, 367 (1930)). Even if this canon properly informed a pre-emption analysis that involved a historic tradition of federal and state regulation, its application in the context of liquor licensing and distribution would be problematic. Liquor trade has been regulated among the Indians largely

Even if this canon of construction were applicable to this case, our result would be the same. The canon is quoted from Indian Law, at 845. In that same volume, the Solicitor of the Interior Department assumed that § 1161 would result in state prosecutions for failing to have a state license. See *id.*, at 382–383. Whatever Congress had to do to provide "expressly" for the application of state law, the Solicitor obviously believed that Congress had done it in § 1161. Indeed, even in *McClanahan*, we suggested that § 1161 satisfied the canon of construction requiring that Congress expressly provide for application of state law. In discussing statutes that did satisfy the canon, we cited § 1161 and stated that "state liquor laws may be applicable within reservations." 411 U. S., at 177, n. 16.[16] More important, we have consistently refused to apply such a canon of construction when application would be tantamount to a formalistic disregard of congressional intent. "We give this rule [resolving ambiguities

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due to early attempts by the tribes themselves to seek assistance in controlling Indian access to liquor. See talk delivered by Little Turtle to President Thomas Jefferson on January 4, 1802, reprinted in 4 American State Papers, Indian Affairs, Vol. 1, p. 655 (1832). In many respects, the concerns about liquor expressed by the tribes were responsible for the development of the dependent status of the tribes. When the substance to be regulated is that primarily responsible for "dependent" status, it makes no sense to say that the historical position of Indians as federal "wards" militates in favor of giving exclusive control over licensing and distribution to the tribes.

[16] In three other cases, we have assumed that § 1161 delegated the authority that we now find that it so delegated. In *Organized Village of Kake* v. *Egan*, 369 U. S. 60, 74 (1962), we stated that "the sale of liquor on reservations has been permitted subject to state law, on consent of the tribe itself." In *United States* v. *Mazurie*, 419 U. S. 544, 547 (1975), we stated that § 1161 permitted "Indian tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian country, so long as state law was not violated." Finally, in *Warren Trading Post Co.*, 380 U. S., at 687, n. 3, we described § 1161 as "permitting application of state liquor law standards within an Indian reservation under certain conditions."

in favor of Indians] the broadest possible scope, but it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes. A canon of construction is not a license to disregard clear expressions of tribal and congressional intent." *DeCoteau* v. *District County Court*, 420 U. S. 425, 447 (1975). See also *Andrus* v. *Glover Construction Co.*, 446 U. S. 608, 619 (1980). In the present case, congressional intent is clear from the face of the statute and its legislative history.[17]

We conclude that § 1161 was intended to remove federal discrimination that resulted from the imposition of liquor prohibition on Native Americans. Congress was well aware that the Indians never enjoyed a tradition of tribal self-government insofar as liquor transactions were concerned. Congress was also aware that the States exercised concurrent authority insofar as prohibiting liquor transactions with Indians was concerned. By enacting § 1161, Congress intended to delegate a portion of its authority to the tribes as well as to the States, so as to fill the void that would be created by the absence of the discriminatory federal prohibition.

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[17] The court below held that "[t]he Termination Acts, Pub. L. 280 [28 U. S. C. § 1360(a)] and section 1161 are statutes regarding the applicability of state law in Indian country and must therefore be considered *in pari materia* and construed together." 678 F. 2d, at 1345, n. 9. In the court's view, § 1161 did not contain language regarding state authority expressed as clearly as in the other statutes. We reject this argument in the light of the clear congressional intent in this case.

Rehner also argues that in the context of passing Pub. L. 280, Congress rejected the view that repeal of federal prohibition was contingent upon applicability of state liquor law. See Brief for Respondent 41–44. Rehner neglects to note that what Congress originally contemplated was that federal prohibition would be lifted in return for Indian acquiescence to broad state civil and criminal jurisdiction over reservations. See Hearings on H. R. 459, H. R. 3235, and H. R. 3624 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 82d Cong., 2d Sess., 30, 48 (1952).

Congress did not intend to make tribal members "super citizens" who could trade in a traditionally regulated substance free from all but self-imposed regulations. See 678 F. 2d, at 1352 (Goodwin, J., dissenting). Rather, we believe that in enacting § 1161, Congress intended to recognize that Native Americans are not "weak and defenseless," and are capable of making personal decisions about alcohol consumption without special assistance from the Federal Government. Application of the state licensing scheme does not "impair a right granted or reserved by federal law." *Kake Village*, 369 U. S., at 75.[18] On the contrary, such application of state law

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[18] The Court of Appeals appeared to accept the argument that Congress delegated to the tribes the exclusive right to license liquor distribution. According to this argument, the reference to state law in § 1161 refers only to the fact that for purposes of determining whether a violation of federal law has occurred, state substantive law, and not regulatory law, is to be incorporated by reference into the federal scheme. The difficulty with this argument is apparent. Nowhere in the text of § 1161, or in the legislative history, is there any distinction between "substantive" and "regulatory" laws. The distinction cannot be found in our decision in *Warren Trading Post Co.*, *supra*. See n. 13, *supra*. In the absence of a context that might possibly require it, we are reluctant to make such a distinction. Cf. *Bryan* v. *Itasca County*, 426 U. S. 373, 390 (1976) (grant of civil jurisdiction in 28 U. S. C. § 1360 does not include regulatory jurisdiction to tax in light of tradition of immunity from taxation). We also note that it appears as though the court was interpreting the reach of *federal criminal jurisdiction* under § 1161 as much as it was deciding the scope of state jurisdiction. In the light of the fact that the Federal Government was not a party below, we do not understand this aspect of the court's holding.

The court also held that because tribal ordinances must be approved by the Secretary of the Interior, Congress has shown its intention to occupy the field. We reject this argument on the basis of the plain language of the statute and its legislative history. That Rehner is a licensed federal trader is also insufficient to show that Congress intended to occupy the field to the exclusion of state laws. Rehner relies on our decision in *Warren Trading Post Co.*, *supra*, in which we held that Arizona could not impose a tax on a federally licensed trader for income earned through trading with reservation Indians on the reservation. In *Warren Trading Post Co.*, we held that Congress did not authorize any additional burden on the licensed trader while in this case we think that Congress *did* authorize the is "specifically authorized by . . . Congress . . . and [does] not interfere with federal policies concerning the reservations." *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685, 687, n. 3 (1965).

III

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The Court today holds that a State may prevent a federally licensed Indian trader from selling liquor on an Indian reservation, or may condition the trader's right to sell liquor upon payment of a substantial license fee. Because I believe the State lacks authority to require a license, I dissent.

Since 1790, see Act of July 22, 1790, ch. 33, 1 Stat. 137, the Federal Government has regulated trade with the Indians and has required persons engaging in such trade to obtain a federal license. Existing law provides:

> "The Commissioner of Indian Affairs shall have the *sole* power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." Act of Aug. 15, 1876, ch. 289, § 5, 19 Stat. 200, 25 U. S. C. § 261 (emphasis added).

A person wishing to trade with the Indians is "permitted to do so under such rules and regulations as the Commissioner

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regulation. In addition, we recognized in *Warren Trading Post Co.* itself the difference between § 1161 and the income tax. See n. 13, *supra*. Our decision in *Central Machinery Co.* v. *Arizona State Tax Comm'n*, 448 U. S. 160 (1980), upon which Rehner also relies in this respect, is based on *Warren Trading Post Co.*, and similarly fails to support Rehner's point.

of Indian Affairs may prescribe," once he has established "to the satisfaction of the Commissioner . . . that he is a proper person to engage in such trade." Act of Mar. 3, 1901, ch. 832, § 1, 31 Stat. 1066, as amended by the Act of Mar. 3, 1903, ch. 994, § 10, 32 Stat. 1009, 25 U. S. C. § 262.

Pursuant to this statutory authority, the Commissioner of Indian Affairs has promulgated detailed regulations governing the licensing and conduct of Indian traders. 25 CFR §§ 140.1–140.26 (1983). An applicant for an Indian trader's license must submit information regarding his financing, his background and business experience, and the persons he intends to employ. Both the applicant and his employees must provide detailed references. See § 140.9(a). Gambling and drug sales on licensed premises are prohibited. §§ 140.19, 140.21. The trader's prices are reviewable by federal officials, his books are subject to inspection, his merchandise must be of good quality, and his credit practices are restricted. §§ 140.22, 140.24. These statutes and regulations governing trade with the Indians have been described aptly as "comprehensive" and "all-inclusive." *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685, 690 (1965).

In *Warren Trading Post*, the Court stated that these statutes and regulations "would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." The Court held that a State could not levy a gross proceeds tax upon the income of a licensed Indian trader, reasoning that imposition of the tax

> "would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders . . . except as authorized by Acts of Congress or by valid regulations promulgated under those Acts. This state tax on gross income would put financial burdens on [the trader] or the Indians with whom it deals in addition to those Congress or the tribes

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> have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up . . . ." *Id.*, at 691.

The Court recently reaffirmed *Warren Trading Post* in *Central Machinery Co.* v. *Arizona Tax Comm'n,* 448 U. S. 160 (1980). In that case, the Court held that federal regulation of Indian traders was so comprehensive that States lacked authority to tax even a sale by an unlicensed trader who maintained no place of business on the reservation. "It is the existence of the Indian trader statutes," the Court said, "and not their administration, that pre-empts the field of transactions with Indians occurring on reservations." *Id.*, at 165. The Court noted that Congress had "'undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject.'" *Id.*, at 166, quoting *Warren Trading Post*, 380 U. S., at 691, n. 18.

The Court's reasoning in *Warren Trading Post* and *Central Machinery*, both of which involved state taxes, necessarily extends to other types of state regulation as well. A State, through its own licensing requirement, cannot choose who may trade with the Indians and what goods they may sell. The "sole power and authority" to make decisions of this type is vested in the Commissioner of Indian Affairs, 25 U. S. C. §261, and applicants who win the Commissioner's approval are to be permitted to trade, §262. An independent requirement of approval by state authorities has no place in this scheme. Yet California imposes just such a requirement on Indian traders who choose to sell a particular product—liquor. California reserves to itself the power to deny any trader the right to sell, and from those to whom it grants permission, it requires a substantial fee.[1] As in *Warren Trad-*

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[1] An application for an off-sale general liquor license must be accompanied by a fee of $6,000, which is deposited in the State's General Fund. Cal. Bus. & Prof. Code Ann. §23954.5 (West Supp. 1983). Once a license is granted, the licensee must pay annual fees totalling $409. §§23053.5,

ing Post, this licensing requirement clearly "frustrate[s] the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders . . . except as authorized by Acts of Congress or by valid regulations." 380 U. S., at 691.

The Court does not explain how it reconciles California's liquor licensing requirement with federal law governing Indian traders. Instead, the Court appears to rest its conclusion on three propositions. First, the Court asserts that "tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians." *Ante*, at 722; see *ante*, at 725, 731. Second, the Court finds a "historical tradition of concurrent state and federal jurisdiction over the use and distribution of alcoholic beverages in Indian country." *Ante*, at 724; see *ante*, at 726, 728, 731, n. 14. Third, the Court concludes that Congress "authorized . . . state regulation over Indian liquor transactions" by enacting 18 U. S. C. § 1161. *Ante*, at 726. None of these propositions supports the Court's conclusion.

The Court gives far too much weight to the fact that Indian tribes historically have not exercised regulatory authority over sales of liquor. In prior pre-emption cases, the Court's focus properly and consistently has been on the reach and comprehensiveness of applicable federal law, colored by the recognition that "traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop' . . . against which vague or ambiguous federal enactments must always be measured." *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 143 (1980), quoting *McClanahan* v. *Arizona State*

23320(21), 23320.2. Portions of these fees are deposited in the General Fund as well. See §§ 23320.2, 25761. Licenses are available in very limited numbers, see § 23817 (West 1964), but are transferable upon the approval of the Department of Alcoholic Beverage Control, see § 24070 (West Supp. 1983). Respondent Rehner has alleged that the market price for an off-sale general license is approximately $55,000. App. JA-7.

Tax Comm'n, 411 U. S. 164, 172 (1973). The Court's analysis has *never* turned on whether the particular area being regulated is one traditionally within the tribe's control. In *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, 458 U. S. 832 (1982), for example, the Court held that comprehensive and pervasive federal regulation of Indian schools precluded the imposition of a state tax on construction of such a school. The Court did not find it relevant that federal policy had not "encourag[ed] the development of Indian-controlled institutions" until the early 1970's, *id.*, at 840, or that the school in question was "the first independent Indian school in modern times," *id.*, at 834. In *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976), the Court held that a State could not require the operator of an on-reservation "smoke shop" to obtain a state cigarette retailer's license; the Court did not inquire whether tribal Indians traditionally had exercised regulatory authority over cigarette sales. And in *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145 (1973), the Court concluded that a State could not impose a use tax on personalty installed in ski lifts at a tribal resort, yet it could scarcely be argued that the construction of ski resorts is a matter with which Indian tribes historically have been concerned.

It is hardly surprising, given the once-prevalent view of Indians as a dependent people in need of constant federal protection and supervision, that tribal authority until recent times has not extended to areas such as education, cigarette retailing, and development of resorts. State authority has been pre-empted in these areas not because they fall within the tribes' historic powers, but rather because federal policy favors leaving Indians free from state control, and because federal law is sufficiently comprehensive to bar the States' exercise of authority. And "[c]ontrol of liquor has historically been one of the most comprehensive federal activities in Indian affairs." F. Cohen, Handbook of Federal Indian Law 307 (1982 ed.). Federal regulation began in 1802, Act of

Mar. 30, 1802, §21, 2 Stat. 146, and sales of liquor to Indians or in Indian country were absolutely prohibited by federal law until 1953. See 18 U. S. C. §§1154, 1156.

In light of this absolute prohibition, the Court's reliance in this case upon what it perceives as a "historical tradition of concurrent state and federal jurisdiction over the use and distribution of alcoholic beverages in Indian country," *ante*, at 724, is disingenuous at best. The Court correctly notes that States were permitted, and in some instances required, to enforce these federal prohibitions through their own criminal laws. *Ante*, at 723–724, and nn. 9, 10. But the sources cited by the Court do not even suggest that the States had independent authority to decide who might sell liquor in Indian country, or to impose regulations in addition to those found in federal law.[2]

The only possible source of state authority to regulate liquor sales, and the source upon which the Court ultimately relies, is 18 U. S. C. §1161. This statute provides that various federal criminal prohibitions against the sale of liquor in Indian country shall not apply to sales "in conformity both with the laws of the State . . . and with an ordinance duly adopted by the tribe having jurisdiction over [the] area . . . ."[3] Sec-

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[2] For the most part, the cases cited by the Court upheld convictions under state statutes barring liquor sales on or off the reservation to persons of Indian descent. Such statutes clearly would be unconstitutional today, and in any event involved no exercise of state regulatory authority over reservation activities. The one case involving on-reservation activity is *State* v. *Lindsey*, 133 Wash. 140, 233 P. 327 (1925), which upheld a conviction of a non-Indian operating a distillery on reservation land. The court concluded that state law was applicable because "no personal or property right of an Indian, tribal or non-tribal, [was] involved in the action," *id.*, at 144, 233 P., at 328, relying on this Court's decision in *Draper* v. *United States*, 164 U. S. 240 (1896).

[3] Section 1161 provides in full:

"The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction 1161 operates as "local-option legislation allowing Indian tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian country, so long as state law [is] not violated." *United States* v. *Mazurie*, 419 U. S. 544, 547 (1975). As is demonstrated by the Court's review of the legislative history, *ante*, at 726–728, and indeed by the language of the statute itself, § 1161 ensures that sales of liquor that would be contrary to state law remain prohibited by federal statute. If a State is altogether "dry," Indian country within that State must be "dry" as well. If a State bans liquor sales to minors or liquor sales on Sundays, sales to minors and Sunday sales also are forbidden in the Indian country. Section 1161, in other words, as the Court has said in the past, "permit[s] application of state liquor law *standards* within an Indian reservation." *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S., at 687, n. 3 (emphasis added).[4]

In this case, of course, no question is raised respecting compliance with state liquor law standards. Respondent Rehner has not challenged the substantive conditions imposed by the State upon the sale of liquor. The sole question before the Court is whether § 1161 grants the State regulatory jurisdiction over liquor transactions on Indian

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tion is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register."

The sections cross-referenced in § 1161 prohibit the distribution of alcoholic beverages to Indians and the possession of alcoholic beverages in Indian country, and establish procedures for enforcing these prohibitions.

[4] Since California exercises general criminal jurisdiction over Indian country pursuant to § 2 of Pub. L. 280, 67 Stat. 588, as amended, 18 U. S. C. § 1162, it may enforce directly any substantive criminal provisions governing liquor sales on Indian reservations. For example, it is a misdemeanor under California law to sell or furnish liquor to a minor, Cal. Bus. & Prof. Code Ann. § 25658 (West 1964); this provision is as applicable in Indian country as elsewhere.

reservations, or, in other words, whether it authorizes the State to require a license as a condition of doing business.[5] On this question, the statute and its legislative history are silent.

This silence is significant, in light of the Court's frequent recognition that "'State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.'" *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S., at 170–171, quoting U. S. Dept. of the Interior, Federal Indian Law 845 (1958); *Bryan* v. *Itasca County*, 426 U. S. 373, 376, n. 2 (1976). In cases where a State seeks to assert regulatory authority, the Court has required far more than a mere reference to state law in a federal statute. In *Bryan* v. *Itasca County*, for example, the Court refused to find a grant of regulatory authority in § 4(a) of Pub. L. 280, 67 Stat. 589, as amended, 28 U. S. C. § 1360(a), which provides that a State's "civil laws . . . that are of general application to private persons or private property shall have the same force and effect within . . . Indian country as they have elsewhere." Despite this seemingly absolute language, the Court found nothing in the statute or its history "remotely resembling an intention to confer general state civil regulatory control over Indian reservations." 426 U. S., at 384. The Court noted that several other statutes passed by the same Congress—the so-called Termination Acts[6]—expressly conferred upon the States general regulatory authority over certain Indian tribes. Construing Pub. L. 280 and the Termination Acts *in*

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[5] In several other federal statutes regulating Indian affairs, Congress has chosen to incorporate substantive state standards into federal law. *E. g.*, 18 U. S. C. § 13 (Assimilative Crimes Act); 18 U. S. C. § 1153 (Major Crimes Act). These statutes, of course, do not confer any regulatory or enforcement jurisdiction on the States.

[6] See, *e. g.*, 68 Stat. 718, 25 U. S. C. § 564; 68 Stat. 769, 25 U. S. C. § 726; 68 Stat. 1103, 25 U. S. C. § 757.

pari materia, the Court concluded that "if Congress in enacting Pub. L. 280 had intended to confer upon the States general civil regulatory powers . . . over reservation Indians, it would have expressly said so." 426 U. S., at 390.

I reach the same conclusion here. This Court has held in other contexts that federal statutes requiring "compl[iance] with . . . State . . . requirements" do not require that the party obtain a state permit or license. *E. g.*, *Hancock* v. *Train*, 426 U. S. 167 (1976) (interpreting § 118 of the Clean Air Act, 42 U. S. C. § 1857f); *EPA* v. *California State Water Resources Control Board*, 426 U. S. 200 (1976) (interpreting § 313 of the Federal Water Pollution Control Act Amendments of 1972, 33 U. S. C. § 1323). The federal agency charged with administering Indian affairs takes the position that § 1161 does not authorize States to enforce their liquor licensing requirements on Indian reservations, *Applicability of the Liquor Laws of the State of Montana on the Rocky Boy's Reservation*, 78 I. D. 39 (1971), and this agency interpretation is entitled to deference.[7] The only other Court of

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[7] Relying on a 1954 opinion issued by the Solicitor of the Department of the Interior, the Court states that the Bureau of Indian Affairs "contemplated that liquor transactions on reservations would be subject to . . . state licensing laws." *Ante*, at 729. In fact, the sole question presented to the Solicitor in 1954 was whether § 1161 authorized a tribe to limit the types of liquor sales permitted on a reservation, *i. e.*, whether the tribe could permit package sales but not sales for on-premises consumption. The Solicitor stated that the tribe could impose such a limit, and that an individual who sold liquor for on-premises consumption would be subject to federal prosecution even if he had obtained a state license permitting on-premises sales. The state license, in other words, would have no effect as far as federal law was concerned. But the Solicitor reserved decision on the question presented in this case:

"What acts would constitute a violation of the liquor laws of the State of California, is not a matter upon which at this time it is appropriate for me to express an opinion. Nor would it be appropriate for me to discuss the liquor licensing authority of the State Board of Equalization . . . ." *Liquor—Tribal Ordinance Regulating Traffic Within Reservation*, Appeals to have considered the question has taken the same position. See *United States* v. *New Mexico*, 590 F. 2d 323 (CA10 1978), cert. denied, 444 U. S. 832 (1979).[8] Because nothing in the language or legislative history of § 1161 indicates any intent to confer licensing authority on the States, I would hold that California's attempt to require Indian traders to obtain state liquor licenses is pre-empted by federal law.

The Court obviously argues to a result that it strongly feels is desirable and good. But that, however strong the feelings may be, is activism in which this Court should not indulge. I therefore dissent.

No. M-36241 (Sept. 22, 1954), reprinted in 2 Op. Solicitor of Dept. of Interior Relating to Indian Affairs 1917-1974, pp. 1648, 1650.

The Solicitor addressed this reserved issue directly in 1971:

"If Congress had intended to impose state law here with state enforcement jurisdiction, we think Congress would have expressly granted jurisdiction to the states under 18 U. S. C. sec. 1161, which it did not do. Rather, we believe the intent was merely to require the state liquor laws to be used as the standard of measurement to define lawful and unlawful activity on the reservation." 78 I. D., at 40.

[8] See also F. Cohen, Handbook of Federal Indian Law 308 (1982) ("[S]ection 1161 incorporates state liquor laws as a standard of measurement to define what conduct is lawful or unlawful under federal law. . . . [R]eservation Indians need not obtain a state liquor license to sell lawfully").

JONES, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY, ET AL. *v.* BARNES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 81-1794. Argued February 22, 1983—Decided July 5, 1983

After respondent was convicted of robbery and assault in a jury trial in a New York state court, counsel was appointed to represent him on appeal. Respondent informed counsel of several claims that he felt should be raised, but counsel rejected most of the suggested claims, stating that they would not aid respondent in obtaining a new trial and that they could not be raised on appeal because they were not based on evidence in the record. Counsel then listed seven potential claims of error that he was considering including in his brief, and invited respondent's "reflections and suggestions" with regard to those claims. Counsel's brief to the Appellate Division of the New York Supreme Court concentrated on three of the claims, two of which had been originally suggested by respondent. In addition, respondent's own *pro se* briefs were filed. At oral argument, counsel argued the points presented in his own brief, but not the arguments raised in the *pro se* briefs. The Appellate Division affirmed the conviction. After respondent was unsuccessful in earlier collateral proceedings attacking his conviction, he filed this action in Federal District Court, seeking habeas corpus relief on the basis that his appellate counsel had provided ineffective assistance. The District Court denied relief, but the Court of Appeals reversed, concluding that under *Anders* v. *California*, 386 U. S. 738—which held that an appointed attorney must advocate his client's cause vigorously and may not withdraw from a nonfrivolous appeal—appointed counsel must present on appeal all nonfrivolous arguments requested by his client. The Court of Appeals held that respondent's counsel had not met this standard in that he failed to present certain nonfrivolous claims.

Held: Defense counsel assigned to prosecute an appeal from a criminal conviction does not have a constitutional duty to raise every nonfrivolous issue requested by the defendant. The accused has the ultimate authority to make certain fundamental decisions regarding his case, including the decision whether to take an appeal; and, with some limitations, he may elect to act as his own advocate. However, an indigent defendant has no constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points. By promulgating a *per se* rule that the client must be allowed to decide what issues are to be pressed, the Court of Appeals seriously undermined the ability of counsel to present the client's case in accord with counsel's professional evaluation. Experienced advocates have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Selecting the most promising issues for review has assumed a greater importance in an era when the time for oral argument is strictly limited in most courts and when page limits on briefs are widely imposed. The decision in *Anders*, far from giving support to the Court of Appeals' rule, is to the contrary; *Anders* recognized that the advocate's role "requires that he support his client's appeal to the best of his ability." 386 U. S., at 744. The appointed counsel in this case did just that. Pp. 750–754.

665 F. 2d 427, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 754. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 755.

Barbara D. Underwood argued the cause for petitioners. With her on the briefs was *Elizabeth Holtzman.*

Sheila Ginsberg Riesel argued the cause for respondent. With her on the brief was *Alan Mansfield.**

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether defense counsel assigned to prosecute an appeal from a criminal conviction has a constitutional duty to raise every nonfrivolous issue requested by the defendant.

I

In 1976, Richard Butts was robbed at knifepoint by four men in the lobby of an apartment building; he was badly

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**Solicitor General Lee, Assistant Attorney General Jensen, Deputy Solicitor General Frey, Edwin S. Kneedler,* and *Deborah Watson* filed a brief for the United States as *amicus curiae* urging reversal.

J. Vincent Aprile II filed a brief for the National Legal Aid and Defender Association as *amicus curiae* urging affirmance.

beaten and his watch and money were taken. Butts informed a Housing Authority detective that he recognized one of his assailants as a person known to him as "Froggy," and gave a physical description of the person to the detective. The following day the detective arrested respondent David Barnes, who is known as "Froggy."

Respondent was charged with first- and second-degree robbery, second-degree assault, and third-degree larceny. The prosecution rested primarily upon Butts' testimony and his identification of respondent.[1] During cross-examination, defense counsel asked Butts whether he had ever undergone psychiatric treatment; however, no offer of proof was made on the substance or relevance of the question after the trial judge *sua sponte* instructed Butts not to answer. At the close of trial, the trial judge declined to give an instruction on accessorial liability requested by the defense. The jury convicted respondent of first- and second-degree robbery and second-degree assault.

The Appellate Division of the Supreme Court of New York, Second Department, assigned Michael Melinger to represent respondent on appeal. Respondent sent Melinger a letter listing several claims that he felt should be raised.[2] Included were claims that Butts' identification testimony should have been suppressed, that the trial judge improperly excluded psychiatric evidence, and that respondent's trial counsel was ineffective. Respondent also enclosed a copy of a *pro se* brief he had written.

In a return letter, Melinger accepted some but rejected most of the suggested claims, stating that they would not aid respondent in obtaining a new trial and that they could not be raised on appeal because they were not based on evidence in the record. Melinger then listed seven potential claims of error that he was considering including in his brief, and invited respondent's "reflections and suggestions" with regard to those seven issues. The record does not reveal any response to this letter.

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[1] This identification, which took place in a one-on-one meeting arranged by the police, was the subject of a pretrial hearing. The trial judge found it unnecessary to rule on the validity of that identification. He concluded that Butts' subsequent in-court identification was based upon an independent source, since Butts had known respondent for several years prior to the robbery.

[2] Respondent's letter is not in the record. Its contents may be inferred from Melinger's letter in response.

Melinger's brief to the Appellate Division concentrated on three of the seven points he had raised in his letter to respondent: improper exclusion of psychiatric evidence, failure to suppress Butts' identification testimony, and improper cross-examination of respondent by the trial judge. In addition, Melinger submitted respondent's own *pro se* brief. Thereafter, respondent filed two more *pro se* briefs, raising three more of the seven issues Melinger had identified.

At oral argument, Melinger argued the three points presented in his own brief, but not the arguments raised in the *pro se* briefs. On May 22, 1978, the Appellate Division affirmed by summary order, *New York* v. *Barnes*, 63 App. Div. 2d 865, 405 N. Y. S. 2d 621 (1978). The New York Court of Appeals denied leave to appeal, *New York* v. *Barnes*, 45 N. Y. 2d 786 (1978).

On August 8, 1978, respondent filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. Respondent raised five claims of error, including ineffective assistance of trial counsel. The District Court held the claims to be without merit and dismissed the petition. *United States ex rel. Barnes* v. *Jones*, No. 78-C-1717 (Nov. 27, 1978). The Court of Appeals for the Second Circuit affirmed, 607 F. 2d 994, and we denied a petition for a writ of certiorari, 444 U. S. 853 (1979).

In 1980, respondent filed two more challenges in state court. On March 4, 1980, he filed a motion in the trial court for collateral review of his sentence. That motion was denied on April 28, and leave to appeal was denied on October 3. Meanwhile, on March 31, 1980, he filed a petition in the

New York Court of Appeals for reconsideration of that court's denial of leave to appeal. In that petition, respondent for the first time claimed that his *appellate* counsel, Melinger, had provided ineffective assistance. The New York Court of Appeals denied the application on April 16, 1980, *New York* v. *Barnes*, 49 N. Y. 2d 1001.

Respondent then returned to United States District Court for the second time, with a petition for habeas corpus based on the claim of ineffective assistance by appellate counsel. The District Court concluded that respondent had exhausted his state remedies, but dismissed the petition, holding that the record gave no support to the claim of ineffective assistance of appellate counsel on "any . . . standard which could reasonably be applied." No. 80-C-2447 (EDNY, Jan. 30, 1981), reprinted in App. to Pet. for Cert. 28a. The District Court concluded:

> "It is not required that an attorney argue every conceivable issue on appeal, especially when some may be without merit. Indeed, it is his professional duty to choose among potential issues, according to his judgment as to their merit and his tactical approach." *Id.*, at 28a–29a.

A divided panel of the Court of Appeals reversed, 665 F. 2d 427 (1981).[3] Laying down a new standard, the majority held that when "the appellant requests that [his attorney] raise additional colorable points [on appeal], counsel *must argue the additional points to the full extent of his professional ability.*" *Id.*, at 433 (emphasis added). In the view of the majority, this conclusion followed from *Anders* v. *California*, 386 U. S. 738 (1967). In *Anders*, this Court held that an appointed attorney must advocate his client's cause vigorously and may not withdraw from a nonfrivolous appeal.

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[3] By this time, at least 26 state and federal judges had considered respondent's claims that he was unjustly convicted for a crime committed five years earlier; and many of the judges had reviewed the case more than once. Until the latest foray, all courts had rejected his claims.

The Court of Appeals majority held that, since *Anders* bars counsel from abandoning a nonfrivolous appeal, it also bars counsel from abandoning a nonfrivolous issue on appeal.

> "[A]ppointed counsel's unwillingness to present particular arguments at appellant's request functions not only to abridge defendant's right to counsel on appeal, but also to limit the defendant's constitutional right of equal access to the appellate process . . . ." 665 F. 2d, at 433.

The Court of Appeals went on to hold that, "[h]aving demonstrated that appointed counsel failed to argue colorable claims at his request, an appellant need not also demonstrate a likelihood of success on the merits of those claims." *Id.*, at 434.

The court concluded that Melinger had not met the above standard in that he had failed to press at least two nonfrivolous claims: the trial judge's failure to instruct on accessory liability and ineffective assistance of trial counsel. The fact that these issues had been raised in respondent's own *pro se* briefs did not cure the error, since "[a] pro se brief is no substitute for the advocacy of experienced counsel." *Ibid.* The court reversed and remanded, with instructions to grant the writ of habeas corpus unless the State assigned new counsel and granted a new appeal.

Circuit Judge Meskill dissented, stating that the majority had overextended *Anders*. In his view, *Anders* concerned only whether an attorney must pursue nonfrivolous *appeals;* it did not imply that attorneys must advance all nonfrivolous *issues*.

We granted certiorari, 457 U. S. 1104 (1982), and we reverse.

II

In announcing a new *per se* rule that appellate counsel must raise every nonfrivolous issue requested by the client,[4] the Court of Appeals relied primarily upon *Anders* v. *California*, *supra*. There is, of course, no constitutional right to an appeal, but in *Griffin* v. *Illinois*, 351 U. S. 12, 18 (1956), and *Douglas* v. *California*, 372 U. S. 353 (1963), the Court held that if an appeal is open to those who can pay for it, an appeal must be provided for an indigent. It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal, see *Wainwright* v. *Sykes*, 433 U. S. 72, 93, n. 1 (1977) (BURGER, C. J., concurring); ABA Standards for Criminal Justice 4–5.2, 21–2.2 (2d ed. 1980). In addition, we have held that, with some limitations, a defendant may elect to act as his or her own advocate, *Faretta* v. *California*, 422 U. S. 806 (1975). Neither *Anders* nor any other decision of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points.

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[4] The record is not without ambiguity as to what respondent requested. We assume, for purposes of our review, that the Court of Appeals majority

This Court, in holding that a state must provide counsel for an indigent appellant on his first appeal as of right, recognized the superior ability of trained counsel in the "examination into the record, research of the law, and marshalling of arguments on [the appellant's] behalf," *Douglas* v. *California*, *supra*, at 358. Yet by promulgating a *per se* rule that the client, not the professional advocate, must be allowed to decide what issues are to be pressed, the Court of Appeals seriously undermines the ability of counsel to present the client's case in accord with counsel's professional evaluation.

Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible,

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correctly concluded that respondent insisted that Melinger raise the issues identified, and did not simply accept Melinger's decision not to press those issues.

or at most on a few key issues. Justice Jackson, after observing appellate advocates for many years, stated:

> "One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. . . . [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one." Jackson, Advocacy Before the United States Supreme Court, 25 Temple L. Q. 115, 119 (1951).

Justice Jackson's observation echoes the advice of countless advocates before him and since. An authoritative work on appellate practice observes:

> "Most cases present only one, two, or three significant questions . . . . Usually, . . . if you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones." R. Stern, Appellate Practice in the United States 266 (1981).[5]

There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts—often to as little as 15 minutes—and when page limits on briefs are widely imposed. See, *e. g.*, Fed. Rule App. Proc. 28(g); McKinney's New York Rules of Court §§ 670.17(g)(2), 670.22 (1982). Even in a court that imposes no time or page limits, however, the new *per se* rule laid down by the Court of Appeals is contrary to all experience and logic. A brief that raises every colorable issue runs the risk of burying good arguments—those that, in the words of the great advocate John W. Davis, "go for the jugular," Davis, The Argument of an Appeal, 26 A. B. A. J. 895, 897 (1940)—in a verbal mound made up of strong and weak contentions. See generally, *e. g.*, Godbold, Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal, 30 Sw. L. J. 801 (1976).[6]

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[5] Similarly, a manual on practice before the Court of Appeals for the Second Circuit declares: "[A] brief which treats more than three or four matters runs serious risks of becoming too diffuse and giving the overall impression that no one claimed error can be serious." Committee on Federal Courts of the Association of the Bar of the City of New York, Appeals to the Second Circuit 38 (1980).

This Court's decision in *Anders*, far from giving support to the new *per se* rule announced by the Court of Appeals, is to the contrary. *Anders* recognized that the role of the advocate "requires that he support his client's appeal to the best of his ability." 386 U. S., at 744. Here the appointed counsel did just that. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every "colorable" claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders*. Nothing in the Constitution or our interpretation of that document requires such a standard.[7] The judgment of the Court of Appeals is accordingly

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[6] The ABA Model Rules of Professional Conduct provide:

"A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. . . . In a criminal case, the lawyer shall abide by the client's decision, . . . *as to a plea to be entered, whether to waive jury trial and whether the client will testify.*" Model Rules of Professional Conduct, Proposed Rule 1.2(a) (Final Draft 1982) (emphasis added).

With the exception of these specified fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client.

Respondent points to the ABA Standards for Criminal Appeals, which appear to indicate that counsel should accede to a client's insistence on pressing a particular contention on appeal, see ABA Standards for Criminal Justice 21-3.2, p. 21·42 (2d ed. 1980). The ABA Defense Function Standards provide, however, that, with the exceptions specified above, strategic and tactical decisions are the exclusive province of the defense counsel, after consultation with the client. See *id.*, 4-5.2. See also ABA Project on Standards for Criminal Justice, The Prosecution Function and The Defense Function § 5.2 (Tent. Draft 1970). In any event, the fact that the ABA may have chosen to recognize a given practice as desirable or appropriate does not mean that that practice is required by the Constitution.

Reversed.

JUSTICE BLACKMUN, concurring in the judgment.

I do not join the Court's opinion, because I need not decide in this case, *ante*, at 751, whether there is or is not a constitutional right to a first appeal of a criminal conviction, and because I agree with JUSTICE BRENNAN, and the American Bar Association, ABA Standards for Criminal Justice 21–3.2, Comment, p. 21·42 (2d ed. 1980), that, as an *ethical* matter, an attorney should argue on appeal all nonfrivolous claims upon which his client insists. Whether or not one agrees with the Court's view of legal strategy, it seems to me that the lawyer, after giving his client his best opinion as to the course most likely to succeed, should acquiesce in the client's choice of which nonfrivolous claims to pursue.

Certainly, *Anders* v. *California*, 386 U. S. 738 (1967), and *Faretta* v. *California*, 422 U. S. 806 (1975), indicate that the attorney's usurpation of certain fundamental decisions can violate the Constitution. I agree with the Court, however, that neither my view, nor the ABA's view, of the ideal allocation of decisionmaking authority between client and lawyer necessarily assumes constitutional status where counsel's performance is "within the range of competence demanded of attorneys in criminal cases," *McMann* v. *Richardson*, 397 U. S. 759, 771 (1970), and "assure[s] the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process," *Ross* v. *Moffitt*, 417 U. S. 600, 616 (1974). I agree that both these requirements were met here.

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[7] The only question presented by this case is whether a criminal defendant has a constitutional right to have appellate counsel raise every nonfrivolous issue that the defendant requests. The availability of federal habeas corpus to review claims that counsel declined to raise is not before us, and we have no occasion to decide whether counsel's refusal to raise requested claims would constitute "cause" for a petitioner's default within the meaning of *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). See also *Engle* v. *Isaac*, 456 U. S. 107, 128 (1982).

But the attorney, by refusing to carry out his client's express wishes, cannot forever foreclose review of nonfrivolous constitutional claims. As I noted in *Faretta* v. *California*, 422 U. S., at 848 (dissenting opinion), "[f]or such overbearing conduct by counsel, there is a remedy," citing *Brookhart* v. *Janis*, 384 U. S. 1 (1966), and *Fay* v. *Noia*, 372 U. S. 391, 439 (1963). The remedy, of course, is a writ of habeas corpus. Thus, while the Court does not reach the question, *ante*, at 754, n. 7, I state my view that counsel's failure to raise on appeal nonfrivolous constitutional claims upon which his client has insisted must constitute "cause and prejudice" for any resulting procedural default under state law. See *Wainwright* v. *Sykes*, 433 U. S. 72 (1977).

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the *Assistance* of Counsel for his defence" (emphasis added). I find myself in fundamental disagreement with the Court over what a right to "the assistance of counsel" means. The import of words like "assistance" and "counsel" seems inconsistent with a regime under which counsel appointed by the State to represent a criminal defendant can refuse to raise issues with arguable merit on appeal when his client, after hearing his assessment of the case and his advice, has directed him to raise them. I would remand for a determination whether respondent did in fact insist that his lawyer brief the issues that the Court of Appeals found were not frivolous.

It is clear that respondent had a right to the assistance of counsel in connection with his appeal. "As we have held again and again, an indigent defendant is entitled to the appointment of counsel to assist him on his first appeal . . . ." *Entsminger* v. *Iowa*, 386 U. S. 748, 751 (1967) (citations omitted).[1] In recognizing the right to counsel on appeal, we have expressly relied not only on the Fourteenth Amendment's Equal Protection Clause, which in this context prohibits disadvantaging indigent defendants in comparison to those who can afford to hire counsel themselves, but also on its Due Process Clause and its incorporation of Sixth Amendment standards. See *Anders* v. *California*, 386 U. S. 738, 744 (1967); *Griffin* v. *Illinois*, 351 U. S. 12, 17 (1956); cf. *Johnson* v. *United States*, 352 U. S. 565, 566 (1957); *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463 (1938). The two theories converge in this case also. Cf. *Bearden* v. *Georgia*, 461 U. S. 660, 665 (1983). A State may not incarcerate a person, whether he is indigent or not, if he has not had (or waived) the assistance of counsel at all stages of the criminal process at which his substantial rights may be affected. *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972); *Mempa* v. *Rhay*, 389 U. S. 128, 134 (1967). In my view, that right to counsel extends to one appeal, provided the defendant decides to take an appeal and the appeal is not frivolous.[2]

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[1] The Court surprisingly announces that "[t]here is, of course, no constitutional right to an appeal." *Ante*, at 751. That statement, besides being unnecessary to its decision, is quite arguably wrong. In *Griffin* v. *Illinois*, 351 U. S. 12 (1956), the fifth member of the majority, Justice Frankfurter, expressed doubt that there was a constitutional right to an appeal:

> "[N]either the unfolding content of 'due process' nor the particularized safeguards of the Bill of Rights disregard procedural ways that reflect a national historic policy. It is significant that no appeals from convictions in the federal courts were afforded (with roundabout exceptions negligible for present purposes) for nearly a hundred years; and, despite the civilized standards of criminal justice in modern England, there was no appeal from convictions (again, with exceptions not now pertinent) until 1907. Thus, it is now settled that due process of law does not require a State to afford review of criminal judgments." *Id.*, at 20–21.

If the question were to come before us in a proper case, I have little doubt that the passage of nearly 30 years since *Griffin* and some 90 years since *McKane* v. *Durston*, 153 U. S. 684 (1894), upon which Justice Frankfurter relied, would lead us to reassess the significance of the factors upon which Justice Frankfurter based his conclusion. I also have little doubt that we would decide that a State must afford at least some opportunity for review of convictions, whether through the familiar mechanism of appeal or through some form of collateral proceeding. There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property, and the reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction. See Kagan, Cartwright, Friedman, & Wheeler, The Evolution of State Supreme Courts, 76 Mich. L.

The Constitution does not on its face define the phrase "assistance of counsel," but surely those words are not empty of content. No one would doubt that counsel must be qualified to practice law in the courts of the State in question,[3] or that the representation afforded must meet minimum standards of effectiveness. See *Powell* v. *Alabama*, 287 U. S. 45, 71

Rev. 961, 994 (1978); Project, 33 Stan. L. Rev. 951, 957, 962–964 (1981). Of course, a case presenting this question is unlikely to arise, for the very reason that a right of appeal is now universal for all significant criminal convictions.

[2] Both indigents and those who can afford lawyers have this right. However, with regard to issues involving the allocation of authority between lawyer and client, courts may well take account of paying clients' ability to specify at the outset of their relationship with their attorneys what degree of control they wish to exercise, and to avoid attorneys unwilling to accept client direction.

[3] Of course, a State may also allow properly supervised law students to represent indigent defendants. See *Argersinger* v. *Hamlin*, 407 U. S. 25, 40–41 (1972) (BRENNAN, J., concurring).

(1932). To satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court. *Anders* v. *California*, *supra*, at 744; *Entsminger* v. *Iowa*, *supra*, at 751. Admittedly, the question in this case requires us to look beyond those clear guarantees. What is at issue here is the relationship between lawyer and client—who has ultimate authority to decide which nonfrivolous issues should be presented on appeal? I believe the right to "the assistance of counsel" carries with it a right, personal to the defendant, to make that decision, against the advice of counsel if he chooses.

If all the Sixth Amendment protected was the State's interest in substantial justice, it would not include such a right. However, in *Faretta* v. *California*, 422 U. S. 806 (1975), we decisively rejected that view of the Constitution, ably advanced by JUSTICE BLACKMUN in dissent. Holding that the Sixth Amendment requires that defendants be allowed to represent themselves, we observed:

> "It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. . . . Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' *Illinois* v. *Allen*, 397 U. S. 337, 350–351 (BRENNAN, J., concurring)." *Id.*, at 834.

Faretta establishes that the right to counsel is more than a right to have one's case presented competently and effectively. It is predicated on the view that the function of counsel under the Sixth Amendment is to protect the dignity and autonomy of a person on trial by *assisting* him in making choices that are his to make, not to make choices for him, although counsel may be better able to decide which tactics will be most effective for the defendant. *Anders* v. *California* also reflects that view. Even when appointed counsel believes an appeal has no merit, he must furnish his client a brief covering all arguable grounds for appeal so that the client may "raise any points that he chooses." 386 U. S., at 744.

The right to counsel as *Faretta* and *Anders* conceive it is not an all-or-nothing right, under which a defendant must choose between forgoing the assistance of counsel altogether or relinquishing control over every aspect of his case beyond its most basic structure (*i. e.*, how to plead, whether to present a defense, whether to appeal). A defendant's interest in his case clearly extends to other matters. Absent exceptional circumstances, he is bound by the tactics used by his counsel at trial and on appeal. *Henry* v. *Mississippi*, 379 U. S. 443, 451 (1965). He may want to press the argument that he is innocent, even if other stratagems are more likely to result in the dismissal of charges or in a reduction of punishment. He may want to insist on certain arguments for political reasons. He may want to protect third parties. This is just as true on appeal as at trial, and the proper role of counsel is to *assist* him in these efforts, insofar as that is possible consistent with the lawyer's conscience, the law, and his duties to the court.

I find further support for my position in the legal profession's own conception of its proper role. The American Bar Association has taken the position that

> "when, in the estimate of counsel, the decision of the client to take an appeal, *or the client's decision to press a particular contention on appeal*, is incorrect[, c]ounsel

> has the professional duty to give to the client fully and forcefully an opinion concerning the case and its probable outcome. *Counsel's role, however, is to advise. The decision is made by the client.*" ABA Standards for Criminal Justice 21–3.2, Comment, p. 21·42 (2 ed. 1980) (emphasis added).[4]

The Court disregards this clear statement of how the profession defines the "assistance of counsel" at the appellate stage of a criminal defense by referring to standards governing the allocation of authority between attorney and client at trial. See *ante*, at 753, n. 6; ABA Standards for Criminal Justice 4–5.2 (2 ed. 1980).[5] In the course of a trial, however, decisions must often be made in a matter of hours, if not minutes or seconds. From the standpoint of effective administration of justice, the need to confer decisive authority on the attorney is paramount with regard to the hundreds of decisions that must be made quickly in the course of a trial. Decisions regarding which issues to press on appeal, in contrast, can and should be made more deliberately, in the course of deciding whether to appeal at all.

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[4] Cf. ABA Model Code of Professional Responsibility EC 7–7 (1980) ("the authority to make decisions is exclusively that of the client" except for decisions "not affecting the merits of the cause or substantially prejudicing the rights of a client"); *id.*, EC 7–8 ("the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client").

[5] See also ABA Commission on Professional Standards, Model Rules of Professional Conduct, Rule 1.2(a) (Final Draft 1982). Rule 1.2(a) requires that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation [if they are not illegal or unethical, or if, despite the fact that he considers them 'repugnant or imprudent,' the lawyer cannot withdraw without prejudicing the client], and shall consult with the client as to the means by which they are to be pursued." It is worth noting, however, that the commentary to Rule 1.2 discloses that its drafters' principal concern was the relationship between insurance company lawyers and insureds they represent, and that Rule 1.2 is intended to provide a basis for disciplinary action as well as general ethical guidance.

The Court's opinion seems to rest entirely on two propositions. First, the Court observes that we have not yet decided this case. This is true in the sense that there is no square holding on point, but as I have explained *supra*, at 758–759, *Anders* and *Faretta* describe the right to counsel in terms inconsistent with today's holding. Moreover, the mere fact that a constitutional question is open is no argument for deciding it one way or the other. Second, the Court argues that good appellate advocacy demands selectivity among arguments. That is certainly true—the Court's advice is good. It ought to be taken to heart by every lawyer called upon to argue an appeal in this or any other court, and by his client. It should take little or no persuasion to get a wise client to understand that, if staying out of prison is what he values most, he should encourage his lawyer to raise only his two or three best arguments on appeal, and he should defer to his lawyer's advice as to which are the best arguments. The Constitution, however, does not require clients to be wise, and other policies should be weighed in the balance as well.

It is no secret that indigent clients often mistrust the lawyers appointed to represent them. See generally Burt, Conflict and Trust Between Attorney and Client, 69 Geo. L. J. 1015 (1981); Skolnick, Social Control in the Adversary System, 11 J. Conflict Res. 52 (1967). There are many reasons for this, some perhaps unavoidable even under perfect conditions—differences in education, disposition, and socioeconomic class—and some that should (but may not always) be zealously avoided. A lawyer and his client do not always have the same interests. Even with paying clients, a lawyer may have a strong interest in having judges and prosecutors think well of him, and, if he is working for a flat fee—a common arrangement for criminal defense attorneys—or if his fees for court appointments are lower than he would receive for other work, he has an obvious financial incentive to conclude cases on his criminal docket swiftly. Good lawyers undoubtedly recognize these temptations and resist them, and they endeavor to convince their clients that they will. It would be naive, however, to suggest that they always succeed in either task. A constitutional rule that encourages lawyers to disregard their clients' wishes without compelling need can only exacerbate the clients' suspicion of their lawyers. As in *Faretta*, to force a lawyer's *decisions* on a defendant "can only lead him to believe that the law contrives against him." See 422 U. S., at 834. In the end, what the Court hopes to gain in effectiveness of appellate representation by the rule it imposes today may well be lost to decreased effectiveness in other areas of representation.

The Court's opinion also seems to overstate somewhat the lawyer's role in an appeal. While excellent presentation of issues, especially at the briefing stage, certainly serves the client's best interests, I do not share the Court's implicit pessimism about appellate judges' ability to recognize a meritorious argument, even if it is made less elegantly or in fewer pages than the lawyer would have liked, and even if less meritorious arguments accompany it. If the quality of justice in this country really depended on nice gradations in lawyers' rhetorical skills, we could no longer call it "justice." Especially at the appellate level, I believe that for the most part good claims will be vindicated and bad claims rejected, with truly skillful advocacy making a difference only in a handful of cases.[6] In most of such cases—in most cases generally—clients ultimately will do the wise thing and take their lawyers' advice. I am not willing to risk deepening the mistrust between clients and lawyers in all cases to ensure optimal presentation for that fraction of a handful in which presentation might really affect the result reached by the court of appeals.

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[6] I do not mean to suggest that this "handful" of cases is not important—it may well include many cases that shape the law. Furthermore, the relative skill of lawyers certainly makes a difference at the trial and pretrial stages, when a lawyer's strategy and ability to persuade may do his client a great deal of good in almost every case, and when his failure to investigate facts or to present them properly may result in their being excluded altogether from the legal system's official conception of what the "case" actually involves.

Finally, today's ruling denigrates the values of individual autonomy and dignity central to many constitutional rights, especially those Fifth and Sixth Amendment rights that come into play in the criminal process. Certainly a person's life changes when he is charged with a crime and brought to trial. He must, if he harbors any hope of success, defend himself on terms—often technical and hard to understand—that are the State's, not his own. As a practical matter, the assistance of counsel is necessary to that defense. See *Johnson* v. *Zerbst*, 304 U. S., at 463. Yet, until his conviction becomes final and he has had an opportunity to appeal, any restrictions on individual autonomy and dignity should be limited to the minimum necessary to vindicate the State's interest in a speedy, effective prosecution. The role of the defense lawyer should be above all to function as the instrument and defender of the client's autonomy and dignity in all phases of the criminal process.

As Justice Black wrote in *Von Moltke* v. *Gillies*, 332 U. S. 708, 725–726 (1948):

> ". . . The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client. *Glasser* v. *United States*, 315 U. S. 60, 70. . . .
>
> ". . . Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer, even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is peculiarly abhorrent" (footnote omitted).

The Court subtly but unmistakably adopts a different conception of the defense lawyer's role—he need do nothing beyond what the State, not his client, considers most important. In many ways, having a lawyer becomes one of the many indignities visited upon someone who has the ill fortune to run afoul of the criminal justice system.

I cannot accept the notion that lawyers are one of the punishments a person receives merely for being accused of a crime. Clients, if they wish, are capable of making informed judgments about which issues to appeal, and when they exercise that prerogative their choices should be respected unless they would require lawyers to violate their consciences, the law, or their duties to the court. On the other hand, I would not presume lightly that, in a particular case, a defendant has disregarded his lawyer's obviously sound advice. Cf. *Faretta* v. *California*, 422 U. S., at 835–836 (standards for waiver of right to counsel). The Court of Appeals, in reversing the District Court, did not address the factual question whether respondent, having been advised by his lawyer that it would not be wise to appeal on all the issues respondent had suggested, actually insisted in a timely fashion that his lawyer brief the nonfrivolous issues identified by the Court of Appeals. Cf. *ante*, at 750–751, n. 4. If he did not, or if he was content with filing his *pro se* brief, then there would be no deprivation of the right to the assistance of counsel. I would remand for a hearing on this question.

ILLINOIS v. ANDREAS

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

No. 81-1843. Argued March 30, 1983—Decided July 5, 1983

A large, locked metal container, shipped by air from Calcutta to respondent in Chicago, was opened by a customs officer at the airport, who found a wooden table with marihuana concealed in a compartment. A Drug Enforcement Administration (DEA) agent confirmed that it was marihuana, and the table and container were resealed. The next day, the DEA agent and a Chicago police officer posed as delivery men and delivered the container to respondent, leaving it in the hallway outside his apartment. The DEA agent stationed himself to keep the container in sight and observed respondent take the container into his apartment. When the other officer left to secure a warrant to search the apartment, the DEA agent maintained surveillance of the apartment. Some 30 or 45 minutes after the delivery, but before the other officer could return with a warrant, respondent emerged from the apartment with the shipping container and was immediately arrested and taken to the police station; there the container was reopened and the marihuana found inside the table was seized. No search warrant had been obtained. Prior to trial on charges of possession of controlled substances, the Illinois state trial court granted respondent's motion to suppress the marihuana. The Illinois Appellate Court affirmed, holding that a "controlled delivery" had not been made, so as to render a warrant unnecessary, because the DEA agent was not present when the container was resealed at the airport by the customs officers and the container was out of sight while it was in respondent's apartment.

Held: The warrantless reopening of the container following its reseizure did not violate respondent's rights under the Fourth Amendment. Pp. 769–773.

(a) If an inspection by police does not intrude upon a legitimate expectation of privacy, there is no "search" subject to the Warrant Clause. No protected privacy interest remains in contraband in a container once government officers lawfully (as here) have opened that container and identified its contents as illegal. The simple act of resealing the container to enable the police to make a controlled delivery does not operate to revive or restore the lawfully invaded privacy rights, and the subsequent reopening of the container is not a "search" within the intendment of the Fourth Amendment. The rigors and contingencies inescapable in an investigation into illicit drug traffic make "perfect" controlled deliveries frequently impossible to attain. The likelihood that contraband may be removed or other items may be placed inside the container during a gap in surveillance depends on all the facts and circumstances, including the nature and uses of the container, the length of the break in surveillance, and the setting in which the events occur. A workable, objective standard that limits the risk of intrusion on legitimate privacy interests when there has been an interruption of surveillance is whether there is a substantial likelihood that the contents of the container have been changed during the gap in surveillance. Pp. 769–773.

(b) There was no substantial likelihood here that the contents of the shipping container were changed during the brief period that it was out of sight of the surveilling officer. Thus, reopening the container did not intrude on any legitimate expectation of privacy and did not violate the Fourth Amendment. P. 773.

100 Ill. App. 3d 396, 426 N. E. 2d 1078, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 773. STEVENS, J., filed a dissenting opinion, *post*, p. 782.

Richard A. Devine argued the cause for petitioner. With him on the briefs were *Neil F. Hartigan*, Attorney General of Illinois, *Tyrone C. Fahner*, former Attorney General, *Michael A. Ficaro*, Assistant Attorney General, *Daniel Harris*, Special Assistant Attorney General, *Michael E. Shabat*, and *Joan S. Cherry*.

Patrick G. Reardon argued the cause for respondent. With him on the brief was *Lawrence J. Suffredin, Jr.**

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented is whether a warrant was required to reopen a sealed container in which contraband drugs had been discovered in an earlier lawful border search, when the container was seized by the police after it had been delivered to respondent under police supervision.

**Solicitor General Lee*, *Assistant Attorney General Jensen*, *Deputy Solicitor General Frey*, *Carolyn F. Corwin*, and *Mervyn Hamburg* filed a brief for the United States as *amicus curiae* urging reversal.

I

A large, locked metal container was shipped by air from Calcutta to respondent in Chicago. When the container arrived at O'Hare International Airport, a customs inspector opened it and found a wooden table approximately three feet in diameter and 8 to 10 inches thick. Marihuana was found concealed inside the table.

The customs inspector informed the Drug Enforcement Administration of these facts and Special Agent Labek came to the airport later that day. Labek chemically tested the substance contained in the table, confirming that it was marihuana. The table and the container were resealed.

The next day, Labek put the container in a delivery van and drove to respondent's building. He was met there by Chicago Police Inspector Lipsek. Posing as delivery men, Labek and Lipsek entered the apartment building and announced they had a package for respondent. Respondent came to the lobby and identified himself. In response to Lipsek's comment about the weight of the package, respondent answered that it "wasn't that heavy; that he had packaged it himself, that it only contained a table." App. 14.

At respondent's request, the officers making the delivery left the container in the hallway outside respondent's apartment. Labek stationed himself to keep the container in sight and observed respondent pull the container into his apartment. When Lipsek left to secure a warrant to enter and search respondent's apartment, Labek maintained surveillance of the apartment; he saw respondent leave his apartment, walk to the end of the corridor, look out the window, and then return to the apartment. Labek remained in the building but did not keep the apartment door under constant surveillance.

Between 30 and 45 minutes after the delivery, but before Lipsek could return with a warrant, respondent reemerged from the apartment with the shipping container and was immediately arrested by Labek and taken to the police station. There, the officers reopened the container and seized the marihuana found inside the table. No search warrant had been obtained.

Respondent was charged with two counts of possession of controlled substances. Ill. Rev. Stat., ch. 56 ½, ¶¶ 704(e) and 705(e) (1981). Prior to trial, the trial court granted respondent's motion to suppress the marihuana found in the table, relying on *Arkansas* v. *Sanders*, 442 U. S. 753 (1979), and *United States* v. *Chadwick*, 433 U. S. 1 (1977).

On appeal, the Appellate Court of Illinois, First Judicial District, affirmed. 100 Ill. App. 3d 396, 426 N. E. 2d 1078 (1981). It relied primarily on *Sanders* and *Chadwick* in holding that respondent had a legitimate expectation of privacy in the contents of the shipping container. 100 Ill. App. 3d, at 399–401, 426 N. E. 2d, at 1080–1082. It recognized that no warrant would be necessary if the police had made a "controlled delivery" of the container following a lawful search, but held that here the police had failed to make a "controlled delivery."

A "controlled delivery," in the view of the Illinois court, requires that the police maintain "dominion and control" over the container at all times; only by constant control, in that court's view, can police be "absolutely sure" that its contents have not changed since the initial search. *Id.*, at 402, 426 N. E. 2d, at 1082. Here, according to the court, the police could not have been "absolutely sure" of the container's contents for two reasons: (1) Labek was not present when the container was resealed by the customs officers, and thus he knew of its contents only by "hearsay," *ibid.*, 426 N. E. 2d, at 1083, and (2) the container was out of sight for the 30 to 45 minutes while it was in respondent's apartment; thus, in the court's view, "there is no certainty that the contents of the package were the same before and after the package was brought into [respondent's] apartment." *Ibid.* Accordingly, the Illinois court held that the warrantless reopening of the container violated the Fourth Amendment.

We granted certiorari, 459 U. S. 904 (1982), and we reverse.

II

The lawful discovery by common carriers or customs officers of contraband in transit[1] presents law enforcement authorities[2] with an opportunity to identify and prosecute the person or persons responsible for the movement of the contraband. To accomplish this, the police, rather than simply seizing the contraband and destroying it, make a so-called controlled delivery of the container to its consignee, allowing the container to continue its journey to the destination contemplated by the parties. The person dealing in the contraband can then be identified upon taking possession of and asserting dominion over the container.[3]

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[1] Common carriers have a common-law right to inspect packages they accept for shipment, based on their duty to refrain from carrying contraband. See *United States* v. *Pryba*, 163 U. S. App. D. C. 389, 397–398, 502 F. 2d 391, 399–400 (1974). Although sheer volume prevents systematic inspection of all or even a large percentage of the cargo in their care, see, *e. g.*, *McConnell* v. *State*, 595 P. 2d 147, 148, and n. 1 (Alaska 1979), carriers do discover contraband in a variety of circumstances. Similarly, although the United States Government has the undoubted right to inspect all incoming goods at a port of entry, see *United States* v. *Ramsey*, 431 U. S. 606, 616–619 (1977), it would be impossible for customs officers to inspect every package. In the course of selective inspections, they inevitably discover contraband in transit.

[2] When common carriers discover contraband in packages entrusted to their care, it is routine for them to notify the appropriate authorities. The arrival of police on the scene to confirm the presence of contraband and to determine what to do with it does not convert the private search by the carrier into a government search subject to the Fourth Amendment. *E. g.*, *United States* v. *Edwards*, 602 F. 2d 458 (CA1 1979).

[3] Of course, the mere fact that the consignee takes possession of the container would not alone establish guilt of illegal possession or importation of contraband. The recipient of the package would be free to offer evidence that the nature of the contents were unknown to him; the nature of the contents and the recipient's awareness of them would be issues for the fact-finder.

The typical pattern of a controlled delivery was well described by one court:

> "Controlled deliveries of contraband apparently serve a useful function in law enforcement. They most ordinarily occur when a carrier, usually an airline, unexpectedly discovers what seems to be contraband while inspecting luggage to learn the identity of its owner, or when the contraband falls out of a broken or damaged piece of luggage, or when the carrier exercises its inspection privilege because some suspicious circumstance has caused it concern that it may unwittingly be transporting contraband. Frequently, after such a discovery, law enforcement agents restore the contraband to its container, then close or reseal the container, and authorize the carrier to deliver the container to its owner. When the owner appears to take delivery he is arrested and the container with the contraband is seized and then searched a second time for the contraband known to be there." *United States* v. *Bulgier*, 618 F. 2d 472, 476 (CA7), cert. denied, 449 U. S. 843 (1980).

See also *McConnell* v. *State*, 595 P. 2d 147 (Alaska 1979).

Here, a customs agent lawfully discovered drugs concealed in a container and notified the appropriate law enforcement authorities. They took steps to arrange delivery of the container to respondent. A short time after delivering the container, the officers arrested respondent and reseized the container.[4] Respondent claims, and the Illinois court held, that the warrantless reopening of the container following its reseizure violated respondent's right under the Fourth Amendment "to be secure . . . against unreasonable searches and seizures . . . ." We disagree.

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[4] Respondent has not claimed that the warrantless seizure of the container from the hallway of his apartment house following his arrest violated the Fourth Amendment; his claim goes only to the warrantless reopening of the container.

The Fourth Amendment protects legitimate expectations of privacy rather than simply places. If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no "search" subject to the Warrant Clause. See *Walter* v. *United States*, 447 U. S. 649, 663–665 (1980) (BLACKMUN, J., dissenting). The threshold question, then, is whether an individual has a legitimate expectation of privacy in the contents of a previously lawfully searched container. It is obvious that the privacy interest in the contents of a container diminishes with respect to a container that law enforcement authorities have already lawfully opened and found to contain illicit drugs. No protected privacy interest remains in contraband in a container once government officers lawfully have opened that container and identified its contents as illegal. The simple act of resealing the container to enable the police to make a controlled delivery does not operate to revive or restore the lawfully invaded privacy rights.

This conclusion is supported by the reasoning underlying the "plain-view" doctrine. The plain-view doctrine authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity. *Texas* v. *Brown*, 460 U. S. 730, 738, and n. 4, 741–742 (1983) (plurality opinion); *id.*, at 746 (POWELL, J., concurring in judgment); *id.*, at 748, 749–750 (STEVENS, J., concurring in judgment). The plain-view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item firsthand, its owner's privacy interest in that item is lost; the owner may retain the incidents of title and possession but not privacy. That rationale applies here; once a container has been found to a certainty to contain illicit drugs,[5] the contraband becomes like objects physically within the plain view of the police, and the claim to privacy is lost. Consequently, the subsequent reopening of the container is not a "search" within the intendment of the Fourth Amendment.

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[5] The Illinois Court held that Labek's absence when the container was resealed by customs officers somehow made less than certain his knowledge of the container's contents. This was plain error: where law enforcement authorities are cooperating in an investigation, as here, the knowl-

However, the rigors and contingencies inescapable in an investigation into illicit drug traffic often make "perfect" controlled deliveries and the "absolute certainty" demanded by the Illinois court impossible to attain. Conducting such a surveillance undetected is likely to render it virtually impossible for police so perfectly to time their movements as to avoid detection and also be able to arrest the owner and reseize the container the instant he takes possession. Not infrequently, police may lose sight of the container they are trailing, as is the risk in the pursuit of a car or vessel.

During such a gap in surveillance, it is possible that the container will be put to other uses—for example, the contraband may be removed or other items may be placed inside. The likelihood that this will happen depends on all the facts and circumstances, including the nature and uses of the container, the length of the break in surveillance, and the setting in which the events occur. However, the mere fact that the police may be less than 100% certain of the contents of the container is insufficient to create a protected interest in the privacy of the container. See *Arkansas* v. *Sanders*, 442 U. S., at 764–765, n. 13. The issue then becomes at what point after an interruption of control or surveillance, courts should recognize the individual's expectation of privacy in the container as a legitimate right protected by the Fourth Amendment proscription against unreasonable searches.

In fashioning a standard, we must be mindful of three Fourth Amendment principles. First, the standard should be workable for application by rank-and-file, trained police officers. See *New York* v. *Belton*, 453 U. S. 454, 458–460 (1981); *United States* v. *Ross*, 456 U. S. 798, 821 (1982).

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edge of one is presumed shared by all. See *Whiteley* v. *Warden*, 401 U. S. 560, 568 (1971).

Second, it should be reasonable; for example, it would be absurd to recognize as legitimate an expectation of privacy where there is only a minimal probability that the contents of a particular container had been changed. Third, the standard should be objective, not dependent on the belief of individual police officers. See *Terry* v. *Ohio*, 392 U. S. 1, 21–22 (1968). A workable, objective standard that limits the risk of intrusion on legitimate privacy interests is whether there is a substantial likelihood that the contents of the container have been changed during the gap in surveillance. We hold that absent a substantial likelihood that the contents have been changed, there is no legitimate expectation of privacy in the contents of a container previously opened under lawful authority.

III

Applying these principles, we conclude there was no substantial likelihood here that the contents of the shipping container were changed during the brief period that it was out of sight of the surveilling officer. The unusual size of the container, its specialized purpose, and the relatively short break in surveillance combine to make it substantially unlikely that the respondent removed the table or placed new items inside the container while it was in his apartment. Thus, reopening the container did not intrude on any legitimate expectation of privacy and did not violate the Fourth Amendment.

The judgment of the Illinois Appellate Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The underlying question in this case is very simple: whether a second search after a prior legal search and a "controlled delivery" will ordinarily require a warrant. The Court answers that question by announcing that the second search is not a search at all, but merely a "reopening," *ante*, at 772, not subject to the protection of the Fourth Amendment. I suppose one should be grateful that the Court has not explicitly opened one more breach in the general rule that "'"searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."'" *United States* v. *Ross*, 456 U. S. 798, 825 (1982), quoting *Mincey* v. *Arizona*, 437 U. S. 385, 390 (1978), in turn quoting *Katz* v. *United States*, 389 U. S. 347, 357 (1967).[1] On the other hand, the Court's rationale, even though limited to a very specific fact pattern, is nevertheless astounding in its implications. We have, to my knowledge, never held that the physical opening and examination of a container in the possession of an individual was anything other than a "search." It might be a permissible search or an impermissible search, require a warrant or not require a warrant, but it is in any event a "search."[2]

I

A

The Court's primary argument in favor of its "no-search" holding can be stated briefly:

> "The threshold question . . . is whether an individual has a legitimate expectation of privacy in the contents of a

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[1] See also, *e. g.*, *Arkansas* v. *Sanders*, 442 U. S. 753, 759 (1979); *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 358 (1977); *United States* v. *United States District Court*, 407 U. S. 297, 318 (1972); *Camara* v. *Municipal Court*, 387 U. S. 523, 528–529 (1967); *Jones* v. *United States*, 357 U. S. 493, 499 (1958).

[2] Indeed, if the "reopening" of a package in a controlled delivery context is not a "search," it is not even clear why it should require probable cause. Fortunately, though, the Court seems to reject this implication of its reasoning. See *ante*, at 771 ("No protected privacy interest remains in contraband in a container once government officials lawfully have opened that container and identified its contents as illegal"); *ante*, at 771–772 ("once a container has been found to a certainty to contain illicit drugs, the contraband becomes like objects physically within the plain view of the police, and the claim to privacy is lost") (footnote omitted).

> previously lawfully searched container. It is obvious that the privacy interest in the contents of a container diminishes with respect to a container that law enforcement authorities have already lawfully opened and found to contain illicit drugs. No protected privacy interest remains in contraband in a container once government officers lawfully have opened that container and identified its contents as illegal. The simple act of sealing the container to enable the police to make a controlled delivery does not operate to revive or restore the lawfully invaded privacy rights." *Ante,* at 771.

The validity of this reasoning depends, however, on what the Court means by "protected privacy interest." Clearly, one aspect of the privacy interest protected by the Fourth Amendment is the right to keep certain *information* beyond official scrutiny. See *United States* v. *Knotts,* 460 U. S. 276, 281–282 (1983) (no reasonable expectation of privacy in location of automobile on public roads). If this were all that were meant by the notion of privacy embodied in the Fourth Amendment, the Court's analysis would be essentially correct. Respondent knowingly and voluntarily rendered his container vulnerable to a perfectly legal and perfectly proper border search. And as soon as that search revealed the presence of contraband, any reasonable expectation respondent may have had that the existence of the contraband would remain secret was lost, and could not be regained.

The Fourth Amendment, however, does not protect *only* information. It also protects, in its own sometimes-forgotten words, "[t]he right of the people *to be secure* in their persons, houses, papers, and effects . . ." (emphasis added). As Justice Brandeis put the matter in his dissent in *Olmstead* v. *United States,* 277 U. S. 438, 478 (1928), the Fourth Amendment "conferred, as against the Government, the *right to be let alone*—the most comprehensive of rights and the right most valued by civilized men" (emphasis added). The right to be "let alone" is, at the very least, the right not to have one's repose and possessions disturbed. See, *e. g., Rakas* v.

Illinois, 439 U. S. 128 (1978); *United States* v. *United States District Court*, 407 U. S. 297, 326–327 (1972) (Douglas, J., concurring); *Alderman* v. *United States*, 394 U. S. 165, 179–180 (1969); *Silverman* v. *United States*, 365 U. S. 505, 511–512 (1961); *Taylor* v. *United States*, 286 U. S. 1 (1932); *Boyd* v. *United States*, 116 U. S. 616, 626–630 (1886).[3] In this case, respondent had the right to maintain the integrity of his container. Admittedly, he waived that right temporarily when the container passed through customs inspection; as *Carroll* v. *United States*, 267 U. S. 132 (1925), teaches us, the right of the Government to search, with or without probable cause, persons and property entering the country is necessary to "national self protection." *Id.*, at 154. But however justified the search at customs may have been, that justification no longer existed once the container was sent on its way, and certainly did not exist once the container was delivered to respondent.

That the Court's reduction of the right to privacy to the right to secrecy is incorrect, and that its implicit analogy between a border search and a loss of amateur status is inapt, is made quite clear by a number of our recent cases.[4] In *Lo-Ji*

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[3] See generally Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 S. Ct. Rev. 173 (discussing "seclusion" and "secrecy" aspects of privacy right protected by the Fourth Amendment); cf. *Whalen* v. *Roe*, 429 U. S. 589, 599, nn. 24–25 (1977).

[4] The Court's confusion may be in part an unintended consequence of our decision in *Katz* v. *United States*, 389 U. S. 347 (1967), where we held that electronic eavesdropping was subject to the warrant requirement even if it involved no physical intrusion into a suspect's "protected area." Before *Katz*, this Court may have focused too much on the "security" aspect of the right of privacy, while giving short shrift to its "secrecy" aspect. In recognizing the importance of secrecy, however, *Katz* did not extinguish the relevance of security. As I wrote only recently, *Katz* "made quite clear that the Fourth Amendment protects against governmental invasions of a person's reasonable 'expectation[s] of privacy,' even when those invasions are not accompanied by physical intrusions. Cases such as *Silverman* v. *United States*, 365 U. S. 505, 509–512 (1961), how-

Sales, Inc. v. *New York,* 442 U. S. 319 (1979), for example, we reviewed the warrantless search of an "adult bookstore" by local law enforcement officials. THE CHIEF JUSTICE, speaking for a unanimous Court, stated:

> "The suggestion is [made] that by virtue of its display of the items at issue to the general public in areas of its store open to them, petitioner had no legitimate expectation of privacy against governmental intrusion, see *Rakas* v. *Illinois*, 439 U. S. 128 (1978), and that accordingly no warrant was needed. But there is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees. See *Lewis* v. *United States*, 385 U. S. 206, 211 (1966)." *Id.*, at 329.

Cf. *Walter* v. *United States*, 447 U. S. 649, 660–662 (1980) (WHITE, J., concurring in judgment). Similarly, in *Michigan* v. *Tyler*, 436 U. S. 499 (1978), we held that, although a building fire and its immediate aftermath are "exigent circumstances" justifying the warrantless entry of the building both by firefighters and by investigators, any further intrusions that take place after the exigent circumstances have passed require a warrant. The fire may suspend the right to be let alone, but it does not extinguish it, and an initial search does not validate the legality of subsequent independent warrantless searches, let alone render them nonsearches. Cf. *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 358–359 (1977).

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ever, hold that, when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment even if the same information could have been obtained by other means. I do not believe that *Katz*, or its progeny, have eroded that principle." *United States* v. *Knotts*, 460 U. S. 276, 286 (1983) (BRENNAN, J., concurring in judgment).

Thus, in its analysis today, the Court breaks new ground and erodes the principles of the Fourth Amendment. Moreover, by claiming that the right to "title and possession" confers no right to "privacy," *ante*, at 771, the Court adopts a view curiously out of touch with the genius of the American system of liberties.

B

The Court supports its "no-search" analysis by an analogy to the "reasoning underlying the 'plain-view' doctrine." *Ibid.* In fact, however, the "plain-view" doctrine hurts rather than helps the Court's case, for it recognizes and indeed emphasizes that the Fourth Amendment protects *security* as well as *secrecy*.

> "We recognized in *Payton* v. *New York*, 445 U. S. 573, 587 (1980), the well-settled rule that 'objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity.' A different situation is presented, however, when the property in open view is 'situated on private premises to which access is not otherwise available for the seizing officer.' *Ibid.*, quoting *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 354 (1977). As these cases indicate, 'plain view' provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment. 'Plain view' is perhaps better understood, therefore, not as an independent 'exception' to the Warrant Clause, but simply as an extension of whatever the prior justification for an officer's 'access to an object' may be." *Texas* v. *Brown*, 460 U. S. 730, 738–739 (1983) (opinion of REHNQUIST, J.) (footnote omitted).

See also *id.*, at 747–749 (STEVENS, J., concurring in judgment); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 464–471 (1971) (plurality opinion). Thus, under the "plain-view" doctrine, the fact that a person displays incriminating evidence in his living room window[5] (or allows it to pass through customs inspection) is *not* enough by itself to authorize a search and seizure of that evidence. More is necessary, and that "more" must be some *independent* reason for breaching the individual's right to repose and to security in his possessions. Moreover, as the Court itself admits, "plain view" can only justify a search or seizure of an item if the authorities have "probable cause to suspect that the item is connected with criminal activity." *Ante*, at 771. Obviously, there would be no need to require probable cause if the protections of the Fourth Amendment did not apply at all to the search or seizure in question. Cf. n. 2, *supra*.

C

The plain-view doctrine does, of course, highlight the fact that there are certain "specifically established and well-delineated exceptions" to the Fourth Amendment's warrant requirement. See *supra*, at 774. Such exceptions, however, require at the very least that there be some compelling government interest at stake, not merely in the search at issue, but in the right to conduct the search *without a warrant*.[6] Moreover, we have repeatedly made clear that "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." *Terry* v. *Ohio*, 392 U. S. 1, 20 (1968). See *United States* v. *Chadwick*, 433 U. S. 1, 13 (1977); *United States* v. *United States District Court*, 407 U. S., at 315–318; *Chimel* v. *California*, 395 U. S. 752, 762 (1969); *Johnson* v. *United*

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[5] Cf. *Coolidge* v. *New Hampshire*, 403 U. S., at 468, and n. 25 (plurality opinion); *Taylor* v. *United States*, 286 U. S. 1 (1932).

[6] "In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant . . . ." *Camara* v. *Municipal Court*, 387 U. S., at 533.

States, 333 U. S. 10, 15 (1948); *Carroll* v. *United States*, 267 U. S., at 153. Indeed, each of the limited exceptions we have established to the warrant requirement arose in a context in which, at the very least, a warrantless search was necessary to preserve the safety of law enforcement officers, see, *e. g.*, *Chimel* v. *California*, *supra* (search incident to arrest), or to prevent the loss or destruction of evidence, see, *e. g.*, *Chambers* v. *Maroney*, 399 U. S. 42, 48–51 (1970) (automobile exception), or in which the very special nature of the government interest made it appropriate to allow a search based on something less than probable cause, see, *e. g.*, *Carroll* v. *United States*, *supra*, at 154 (border search). In the plain-view context, the compelling government interest is evident: the legal search has already put potential suspects on notice that they are the objects of official interest; the delay inherent in obtaining a warrant at that point might risk the destruction of the evidence and even the security of the officers. See *Coolidge*, *supra*, at 467–468 (plurality opinion). This case, however, presents none of the conditions that we have previously held indispensable to the recognition of an exception to the warrant requirement. The police officers who conducted the search of respondent's container could have obtained, were indeed in the process of obtaining, a search warrant, but decided instead—for no apparent reason other than the hope of vindication in this Court—to conduct the search without a warrant. Thus, even if one were to recharacterize the Court's novel "no-search" analysis as simply another exception to the warrant requirement, it would be difficult to square that result with the clear mandate of our previous decisions.

I agree entirely with the Court that "controlled delivery" is a proper and effective tool of responsible law enforcement. See *ante*, at 769–770. If contraband is discovered in a package passing through customs inspection, the authorities are not required to seize it then and there, but may make use of their discovery to obtain more evidence and to capture the culprits behind the contraband. The "controlled delivery" technique, however, would be just as effective, and decidedly more proper, if the second search that came at its culmination were authorized by a valid search warrant. Under these circumstances, I am not at all sure what interest the Court thinks it is vindicating by its determined if awkward exertions.

II

Even if the Court were correct that the "reopening" of a package after a properly controlled "controlled delivery" is not a "search," I could still not agree with the standard it fashions to put that principle into effect, or with the result it reaches in this case. The Court holds that a "reopening" is not a "search" as long as there is not a "substantial likelihood that the contents of the container have been changed during [a] gap in surveillance." *Ante*, at 773. Of course, "the rigors and contingencies inescapable in an investigation into illicit drug traffic often make 'perfect' controlled deliveries and . . . 'absolute certainty' . . . impossible," *ante*, at 772. Nevertheless, the very justifications proffered by the Court for its "no-search" analysis should have at least led it to require something very close to "absolute certainty." Cf. *post*, p. 782 (STEVENS, J., dissenting). After all, if a person has no reasonable expectation of privacy in a package whose contents are already legally known to the authorities, a reasonable expectation of privacy should reattach if the person has unobserved access to the package and any opportunity to change its contents. By adopting a vague intermediate standard, the Court makes more likely serious intrusions into what even it would consider to be "reasonable expectations of privacy." Moreover, I cannot see how as indistinct a phrase as "substantial likelihood" could in any way serve the Court's interest in fashioning a standard "workable for application by rank-and-file, trained police officers." *Ante*, at 772.

In this case, the package subject to a "controlled delivery" was in respondent's possession for between 30 and 45 minutes. For a good deal of that time, it was unobserved. I am by no means convinced that there was, as an *ex ante* matter, even a "substantial likelihood" that the container still contained contraband when it was searched, or "reopened." In any event, I fail to see how, in light of the very justifications put forward by the Court for a "controlled delivery" gloss on the Fourth Amendment, a warrantless search can be justified here as in any way consistent with the principles embodied in that Amendment.

I dissent.

JUSTICE STEVENS, dissenting.

The issue in this case is remarkably similar to the controlling issue in *Texas* v. *Brown*, 460 U. S. 730 (1983): Was there "virtual certainty" that the police would find contraband inside an unusual container that they had lawfully seized? The unique character of the balloon in *Brown*, like the unique character of the metal case enclosing a table that in turn had been designed to conceal drugs, combined with other circumstantial evidence, provided powerful evidentiary support for the conclusion that contraband was inside the container. In this case, as in *Brown*, I believe the "absolute certainty" test applied by the state court was somewhat more strict than is required by the Fourth Amendment to the United States Constitution. I would therefore vacate the judgment of the Illinois Appellate Court and remand for further proceedings.*

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*If I were sitting as a trial judge, and actually had heard the evidence, I believe I would have found that there was virtual certainty that the police officers were correct in both cases. But, unlike my colleagues, I do not believe it is this Court's province to make such factual determinations. See *United States* v. *Hasting*, 461 U. S. 499, 516–517 (1983) (STEVENS, J., concurring in judgment); *First National City Bank* v. *Banco para el Comercio Exterior de Cuba*, 462 U. S. 611, 636 (1983) (STEVENS, J., concurring in part and dissenting in part).

MARSH, NEBRASKA STATE TREASURER, ET AL. *v.* CHAMBERS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82-23. Argued April 20, 1983—Decided July 5, 1983

The Nebraska Legislature begins each of its sessions with a prayer by a chaplain paid by the State with the legislature's approval. Respondent member of the Nebraska Legislature brought an action in Federal District Court, claiming that the legislature's chaplaincy practice violates the Establishment Clause of the First Amendment, and seeking injunctive relief. The District Court held that the Establishment Clause was not breached by the prayer but was violated by paying the chaplain from public funds, and accordingly enjoined the use of such funds to pay the chaplain. The Court of Appeals held that the whole chaplaincy practice violated the Establishment Clause, and accordingly prohibited the State from engaging in any aspect of the practice.

Held: The Nebraska Legislature's chaplaincy practice does not violate the Establishment Clause. Pp. 786-795.

(a) The practice of opening sessions of Congress with prayer has continued without interruption for almost 200 years ever since the First Congress drafted the First Amendment, and a similar practice has been followed for more than a century in Nebraska and many other states. While historical patterns, standing alone, cannot justify contemporary violations of constitutional guarantees, historical evidence in the context of this case sheds light not only on what the drafters of the First Amendment intended the Establishment Clause to mean but also on how they thought that Clause applied to the chaplaincy practice authorized by the First Congress. In applying the First Amendment to the states through the Fourteenth Amendment, it would be incongruous to interpret the Clause as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government. In light of the history, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke divine guidance on a public body entrusted with making the laws is not, in these circumstances, a violation of the Establishment Clause; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. Pp. 786-792.

(b) Weighed against the historical background, the facts that a clergyman of only one denomination has been selected by the Nebraska Legislature for 16 years, that the chaplain is paid at public expense, and that the prayers are in the Judeo-Christian tradition do not serve to invalidate Nebraska's practice. Pp. 792–795.

675 F. 2d 228, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 795. STEVENS, J., filed a dissenting opinion, *post*, p. 822.

Shanler D. Cronk, Assistant Attorney General of Nebraska, argued the cause for petitioners. With him on the briefs was *Paul L. Douglas*, Attorney General.

Herbert J. Friedman argued the cause for respondent. With him on the brief were *Stephen L. Pevar*, *Burt Neuborne*, and *Charles S. Sims*.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented is whether the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause of the First Amendment.

I

The Nebraska Legislature begins each of its sessions with a prayer offered by a chaplain who is chosen biennially by the Executive Board of the Legislative Council and paid out of

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**Solicitor General Lee, Assistant Attorney General McGrath, Deputy Solicitor General Geller, Kathryn A. Oberly, Leonard Schaitman*, and *Michael Jay Singer* filed a brief for the United States as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Nathan Z. Dershowitz* and *Marc D. Stern* for the American Jewish Congress; by *David J. Eiseman, Justin J. Finger*, and *Jeffrey P. Sinensky* for the Anti-Defamation League of B'nai Brith; and by *Thomas P. Gies* for Jon Garth Murray et al.

Lanny M. Proffer filed a brief for the National Conference of State Legislatures as *amicus curiae*.

public funds.[1] Robert E. Palmer, a Presbyterian minister, has served as chaplain since 1965 at a salary of $319.75 per month for each month the legislature is in session.

Ernest Chambers is a member of the Nebraska Legislature and a taxpayer of Nebraska. Claiming that the Nebraska Legislature's chaplaincy practice violates the Establishment Clause of the First Amendment, he brought this action under 42 U. S. C. § 1983, seeking to enjoin enforcement of the practice.[2] After denying a motion to dismiss on the ground of legislative immunity, the District Court held that the Establishment Clause was not breached by the prayers, but was violated by paying the chaplain from public funds. 504 F. Supp. 585 (Neb. 1980). It therefore enjoined the legislature from using public funds to pay the chaplain; it declined to enjoin the policy of beginning sessions with prayers. Cross-appeals were taken.[3]

The Court of Appeals for the Eighth Circuit rejected arguments that the case should be dismissed on Tenth Amendment, legislative immunity, standing, or federalism grounds. On the merits of the chaplaincy issue, the court refused to treat respondent's challenges as separable issues as the District Court had done. Instead, the Court of Appeals assessed the practice as a whole because "[p]arsing out [the] elements" would lead to "an incongruous result." 675 F. 2d 228, 233 (1982).

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[1] Rules of the Nebraska Unicameral, Rules 1, 2, and 21. These prayers are recorded in the Legislative Journal and, upon the vote of the legislature, collected from time to time into prayerbooks, which are published at public expense. In 1975, 200 copies were printed; prayerbooks were also published in 1978 (200 copies), and 1979 (100 copies). In total, publication costs amounted to $458.56.

[2] Respondent named as defendants State Treasurer Frank Marsh, Chaplain Palmer, and the members of the Executive Board of the Legislative Council in their official capacity. All appear as petitioners before us.

[3] The District Court also enjoined the State from using public funds to publish the prayers, holding that this practice violated the Establishment Clause. Petitioners have represented to us that they did not challenge this facet of the District Court's decision, Tr. of Oral Arg. 19–20. Accordingly, no issue as to publishing these prayers is before us.

Applying the three-part test of *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971), as set out in *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 773 (1973), the court held that the chaplaincy practice violated all three elements of the test: the purpose and primary effect of selecting the same minister for 16 years and publishing his prayers was to promote a particular religious expression; use of state money for compensation and publication led to entanglement. 675 F. 2d, at 234–235. Accordingly, the Court of Appeals modified the District Court's injunction and prohibited the State from engaging in any aspect of its established chaplaincy practice.

We granted certiorari limited to the challenge to the practice of opening sessions with prayers by a state-employed clergyman, 459 U. S. 966 (1982), and we reverse.[4]

II

The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of this Court.

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[4] Petitioners also sought review of their Tenth Amendment, federalism, and immunity claims. They did not, however, challenge the Court of Appeals' decision as to standing and we agree that Chambers, as a member of the legislature and as a taxpayer whose taxes are used to fund the chaplaincy, has standing to assert this claim.

The tradition in many of the Colonies was, of course, linked to an established church,[5] but the Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain. See, *e. g.*, 1 J. Continental Cong. 26 (1774); 2 *id.*, at 12 (1775); 5 *id.*, at 530 (1776); 6 *id.*, at 887 (1776); 27 *id.*, at 683 (1784). See also 1 A. Stokes, Church and State in the United States 448–450 (1950). Although prayers were not offered during the Constitutional Convention,[6] the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer. Thus, on April 7, 1789, the Senate appointed a committee "to take under consideration the manner of electing Chaplains." S. Jour., 1st Cong., 1st Sess., 10 (1820 ed.). On April 9, 1789, a similar committee was appointed by the House of Representatives. On April 25, 1789, the Senate elected its first chaplain, *id.*, at 16; the House followed suit on May 1, 1789, H. R. Jour., 1st Cong., 1st Sess., 26 (1826 ed.). A statute providing for the payment of these chaplains was enacted into law on September 22, 1789.[7] 2 Annals of Cong. 2180; §4, 1 Stat. 71.[8]

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[5] The practice in Colonies with established churches is, of course, not dispositive of the legislative prayer question. The history of Virginia is instructive, however, because that Colony took the lead in defining religious rights. In 1776, the Virginia Convention adopted a Declaration of Rights that included, as Article 16, a guarantee of religious liberty that is considered the precursor of both the Free Exercise and Establishment Clauses. 1 B. Schwartz, The Bill of Rights: A Documentary History 231–236 (1971); S. Cobb, The Rise of Religious Liberty in America 491–492 (1970). Virginia was also among the first to disestablish its church. Both before and after disestablishment, however, Virginia followed the practice of opening legislative sessions with prayer. See, *e. g.*, J. House of Burgesses 34 (Nov. 20, 1712); Debates of the Convention of Virginia 470 (June 2, 1788) (ratification convention); J. House of Delegates of Va. 3 (June 24, 1788) (state legislature).

Rhode Island's experience mirrored that of Virginia. That Colony was founded by Roger Williams, who was among the first of his era to espouse the principle of religious freedom. Cobb, *supra*, at 426. As early as 1641, its legislature provided for liberty of conscience. *Id.*, at 430. Yet the sessions of its ratification convention, like Virginia's, began with prayers, see W. Staples, Rhode Island in the Continental Congress, 1765–1790, p. 668 (1870) (reprinting May 26, 1790, minutes of the convention).

[6] History suggests that this may simply have been an oversight. At one point, Benjamin Franklin suggested that "henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business." 1 M. Farrand, Records of the Federal Convention of 1787, p. 452 (1911). His proposal was rejected not because the Convention was opposed to prayer, but because it was thought that a midstream adoption of the policy would highlight prior omissions and because "[t]he Convention had no funds." *Ibid.;* see also Stokes, at 455–456.

On September 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights, S. Jour., *supra*, at 88; H. R. Jour., *supra*, at 121.[9] Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.[10] It has also been followed consistently in most of the states,[11] including Nebraska, where the institution of opening legislative sessions with prayer was adopted even before the State attained statehood. Neb.

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[7] The statute provided:

"[T]here shall be allowed to each chaplain of Congress . . . five hundred dollars per annum during the session of Congress."

This salary compares favorably with the Congressmen's own salaries of $6 for each day of attendance, 1 Stat. 70–71.

[8] It bears note that James Madison, one of the principal advocates of religious freedom in the Colonies and a drafter of the Establishment Clause, see, *e. g.*, Cobb, *supra* n. 5, at 495–497; Stokes, at 537–552, was one of those appointed to undertake this task by the House of Representatives, H. R. Jour., at 11–12; Stokes, at 541–549, and voted for the bill authorizing payment of the chaplains, 1 Annals of Cong. 891 (1789).

[9] Interestingly, September 25, 1789, was also the day that the House resolved to request the President to set aside a Thanksgiving Day to acknowledge "the many signal favors of Almighty God," H. R. Jour., at 123. See also S. Jour., at 88.

[10] The chaplaincy was challenged in the 1850's by "sundry petitions praying Congress to abolish the office of chaplain," S. Rep. No. 376, 32d Cong., 2d Sess., 1 (1853). After consideration by the Senate Committee on the

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Judiciary, the Senate decided that the practice did not violate the Establishment Clause, reasoning that a rule permitting Congress to elect chaplains is not a law establishing a national church and that the chaplaincy was no different from Sunday Closing Laws, which the Senate thought clearly constitutional. In addition, the Senate reasoned that since prayer was said by the very Congress that adopted the Bill of Rights, the Founding Fathers could not have intended the First Amendment to forbid legislative prayer or viewed prayer as a step toward an established church. *Id.*, at 2–4. In any event, the 35th Congress abandoned the practice of electing chaplains in favor of inviting local clergy to officiate, see Cong. Globe, 35th Cong., 1st Sess., 14, 27–28 (1857). Elected chaplains were reinstituted by the 36th Congress, Cong. Globe, 36th Cong., 1st Sess., 162 (1859); *id.*, at 1016 (1860).

[11] See Brief for National Conference of State Legislatures as *Amicus Curiae*. Although most state legislatures begin their sessions with prayer, most do not have a formal rule requiring this procedure. But see, *e. g.*, Alaska Legislature Uniform Rules 11 and 17 (1981) (providing for opening invocation); Ark. Rule of Senate 18 (1983); Colo. Legislator's Handbook, H. R. Rule 44 (1982); Idaho Rules of H. R. and Joint Rules 2 and 4 (1982); Ind. H. R. Rule 10 (1983); Kan. Rule of Senate 4 (1983); Kan. Rule of H. R. 103 (1983); Ky. General Assembly H. Res. 2 (1982); La. Rules of Order, Senate Rule 10.1 (1983); La. Rules of Order, H. R. Rule 8.1 (1982); Me. Senate and House Register, Rule of H. R. 4 (1983); Md. Senate and House of Delegates Rules 1 (1982 and 1983); Mo. Rules of Legislature, Joint Rule 1-1 (1983); N. H. Manual for the General Court of N. H., Rule of H. R. 52(a) (1981); N. D. Senate and H. R. Rules 101 and 301 (1983); Ore. Rule of Senate 4.01 (1983); Ore. Rule of H. R. 4.01 (1983) (opening session only); 104 Pa. Code § 11.11 (1983), 107 Pa. Code § 21.17 (1983); S. D. Official Directory and Rules of Senate and H. R., Joint Rule of the Senate and House 4-1 (1983); Tenn. Permanent Rules of Order of the Senate 1 and 6 (1981–1982) (provides for admission into Senate chamber of the "Chaplain of the Day"); Tex. Rule of H. R. 2, § 6 (1983); Utah Rules of Senate and H. R. 4.04 (1983); Va. Manual of Senate and House of Delegates, Rule of Senate 21(a) (1982) (session opens with "period of devotions"); Wash. Permanent Rule of H. R. 15 (1983); Wyo. Rule of Senate 4-1 (1983); Wyo. Rule of H. R. 2-1 (1983). See also P. Mason, Manual of Legislative Procedure § 586(2) (1979).

Jour. of Council, General Assembly, 1st Sess., 16 (Jan. 22, 1855).

Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent. An Act

> "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning." *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 297 (1888).

In *Walz* v. *Tax Comm'n*, 397 U. S. 664, 678 (1970), we considered the weight to be accorded to history:

> "It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . is not something to be lightly cast aside."

No more is Nebraska's practice of over a century, consistent with two centuries of national practice, to be cast aside. It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable. In applying the First Amendment to the states through the Fourteenth Amendment, *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), it would be incongruous to interpret that Clause as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government.

This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged. We conclude that legislative prayer presents no more potential for establishment than the provision of school transportation, *Everson* v. *Board of Education*, 330 U. S. 1 (1947), beneficial grants for higher education, *Tilton* v. *Richardson*, 403 U. S. 672 (1971), or tax exemptions for religious organizations, *Walz*, *supra*.

Respondent cites JUSTICE BRENNAN's concurring opinion in *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 237 (1963), and argues that we should not rely too heavily on "the advice of the Founding Fathers" because the messages of history often tend to be ambiguous and not relevant to a society far more heterogeneous than that of the Framers, *id.*, at 240. Respondent also points out that John Jay and John Rutledge opposed the motion to begin the first session of the Continental Congress with prayer. Brief for Respondent 60.[12]

We do not agree that evidence of opposition to a measure weakens the force of the historical argument; indeed it infuses it with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society. Jay and Rutledge specifically grounded their objection on the fact that the delegates to the Congress "were so divided in religious sentiments . . . that [they] could not join in the same act of worship." Their objection was met by Samuel Adams, who stated that "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country." C. Adams, Familiar Letters of John Adams and his Wife, Abigail Adams, during the Revolution 37–38, reprinted in Stokes, at 449.

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[12] It also could be noted that objections to prayer were raised, apparently successfully, in Pennsylvania while ratification of the Constitution was debated, Penn. Herald, Nov. 24, 1787, and that in the 1820's, Madison expressed doubts concerning the chaplaincy practice. See L. Pfeffer, Church, State, and Freedom 248–249 (rev. ed. 1967), citing Fleet, Madison's "Detached Memoranda," 3 Wm. & Mary Quarterly 534, 558–559 (1946).

This interchange emphasizes that the delegates did not consider opening prayers as a proselytizing activity or as symbolically placing the government's "official seal of approval on one religious view," cf. 675 F. 2d, at 234. Rather, the Founding Fathers looked at invocations as "conduct whose . . . effect . . . harmonize[d] with the tenets of some or all religions." *McGowan* v. *Maryland*, 366 U. S. 420, 442 (1961). The Establishment Clause does not always bar a state from regulating conduct simply because it "harmonizes with religious canons." *Id.*, at 462 (Frankfurter, J., concurring). Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to "religious indoctrination," see *Tilton, supra*, at 686; *Colo* v. *Treasurer & Receiver General*, 378 Mass. 550, 559, 392 N. E. 2d 1195, 1200 (1979), or peer pressure, compare *Abington, supra*, at 290 (BRENNAN, J., concurring).

In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach* v. *Clauson*, 343 U. S. 306, 313 (1952).

III

We turn then to the question of whether any features of the Nebraska practice violate the Establishment Clause.

Beyond the bare fact that a prayer is offered, three points have been made: first, that a clergyman of only one denomination—Presbyterian—has been selected for 16 years;[13] second, that the chaplain is paid at public expense; and third, that the prayers are in the Judeo-Christian tradition.[14] Weighed against the historical background, these factors do not serve to invalidate Nebraska's practice.[15]

The Court of Appeals was concerned that Palmer's long tenure has the effect of giving preference to his religious views. We cannot, any more than Members of the Congresses of this century, perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church. To the contrary, the evidence indicates that Palmer was reappointed because his performance and personal qualities were acceptable to the body appointing him.[16] Palmer was not the only clergyman heard by the legislature; guest chaplains have officiated at the request of various legislators and as substitutes during Palmer's absences. Tr. of Oral Arg. 10. Absent proof that the chaplain's reappointment stemmed from an impermissible motive, we conclude that his long tenure does not in itself conflict with the Establishment Clause.[17]

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[13] In comparison, the First Congress provided for the appointment of two chaplains of different denominations who would alternate between the two Chambers on a weekly basis, S. Jour., 1st Cong., 1st Sess., 12 (1820 ed.); H. R. Jour., 1st Cong., 1st Sess., 16 (1826 ed.).

[14] Palmer characterizes his prayers as "nonsectarian," "Judeo Christian," and with "elements of the American civil religion." App. 75 and 87 (deposition of Robert E. Palmer). Although some of his earlier prayers were often explicitly Christian, Palmer removed all references to Christ after a 1980 complaint from a Jewish legislator. *Id.*, at 49.

[15] It is also claimed that Nebraska's practice of collecting the prayers into books violates the First Amendment. Because the State did not appeal the District Court order enjoining further publications, see n. 3, *supra*, this issue is not before us and we express no opinion on it.

[16] Nebraska's practice is consistent with the manner in which the First Congress viewed its chaplains. Reports contemporaneous with the elections reported only the chaplains' names, and not their religions or church affiliations, see, *e. g.*, 2 Gazette of the U. S. 18 (Apr. 25, 1789); 5 *id.*, at 18 (Apr. 27, 1789) (listing nominees for Chaplain of the House); 6 *id.*, at 23 (May 1, 1789). See also S. Rep. 376, *supra* n. 10, at 3.

Nor is the compensation of the chaplain from public funds a reason to invalidate the Nebraska Legislature's chaplaincy; remuneration is grounded in historic practice initiated, as we noted earlier, *supra*, at 788, by the same Congress that drafted the Establishment Clause of the First Amendment. The Continental Congress paid its chaplain, see, *e. g.*, 6 J. Continental Cong. 887 (1776), as did some of the states, see, *e. g.*, Debates of the Convention of Virginia 470 (June 26, 1788). Currently, many state legislatures and the United States Congress provide compensation for their chaplains, Brief for National Conference of State Legislatures as *Amicus Curiae* 3; 2 U. S. C. §§61d and 84–2 (1982 ed.); H. R. Res. 7, 96th Cong., 1st Sess. (1979).[18] Nebraska has paid its chaplain for well over a century, see 1867 Neb. Laws 85, §§2–4 (June 21, 1867), reprinted in Neb. Gen. Stat. 459 (1873). The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

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[17] We note that Dr. Edward L. R. Elson served as Chaplain of the Senate of the United States from January 1969 to February 1981, a period of 12 years; Dr. Frederick Brown Harris served from February 1949 to January 1969, a period of 20 years. Senate Library, Chaplains of the Federal Government (rev. ed. 1982).

[18] The states' practices differ widely. Like Nebraska, several states choose a chaplain who serves for the entire legislative session. In other states, the prayer is offered by a different clergyman each day. Under either system, some states pay their chaplains and others do not. For States providing for compensation statutorily or by resolution, see, *e. g.*, Cal. Gov't Code Ann. §§9170, 9171, 9320 (West 1980), and S. Res. No. 6, 1983–1984 Sess.; Colo. H. R. J., 54th Gen. Assembly, 1st Sess., 17–19 (Jan. 5, 1983); Conn. Gen. Stat. Ann. §2-9 (1983–1984); Ga. H. R. Res. No. 3, §1(e) (1983); Ga. S. Res. No. 3, §1(c) (1983); Iowa Code §2.11 (1983); Mo. Rev. Stat. §21.150 (1978); Nev. Rev. Stat. §218.200 (1981); N. J. Stat. Ann. §52:11-2 (West 1970); N. M. Const., Art. IV, §9; Okla. Stat. Ann., Tit. 74, §§291.12 and 292.1 (West Supp. 1982–1983); Vt. Stat. Ann., Tit. 2, §19 (Supp. 1982); Wis. Stat. Ann. §13.125 (West Supp. 1982).

We do not doubt the sincerity of those, who like respondent, believe that to have prayer in this context risks the beginning of the establishment the Founding Fathers feared. But this concern is not well founded, for as Justice Goldberg aptly observed in his concurring opinion in *Abington*, 374 U. S., at 308:

> "It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow."

The unbroken practice for two centuries in the National Congress and for more than a century in Nebraska and in many other states gives abundant assurance that there is no real threat "while this Court sits," *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U. S. 218, 223 (1928) (Holmes, J., dissenting).

The judgment of the Court of Appeals is

Reversed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Court today has written a narrow and, on the whole, careful opinion. In effect, the Court holds that officially sponsored legislative prayer, primarily on account of its "unique history," *ante*, at 791, is generally exempted from the First Amendment's prohibition against "an establishment of religion." The Court's opinion is consistent with dictum in at least one of our prior decisions,[1] and its limited rationale should pose little threat to the overall fate of the Establishment Clause. Moreover, disagreement with the Court requires that I confront the fact that some 20 years ago, in a concurring opinion in one of the cases striking down official prayer and ceremonial Bible reading in the public schools, I came very close to endorsing essentially the result reached by the Court today.[2] Nevertheless, after much reflection, I have come to the conclusion that I was wrong then and that the Court is wrong today. I now believe that the practice of official invocational prayer, as it exists in Nebraska and most other state legislatures, is unconstitutional. It is contrary to the doctrine as well the underlying purposes of the Establishment Clause, and it is not saved either by its history or by any of the other considerations suggested in the Court's opinion.

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[1] See *Zorach* v. *Clauson*, 343 U. S. 306, 312–313 (1952); cf. *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 213 (1963).

I respectfully dissent.

I

The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal "tests" that have traditionally structured our inquiry under the Establishment Clause. That it fails to do so is, in a sense, a good thing, for it simply confirms that the Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer. For my purposes, however, I must begin by demonstrating what should be obvious: that, if the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause.

The most commonly cited formulation of prevailing Establishment Clause doctrine is found in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971):

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[2] "The saying of invocational prayers in legislative chambers, state or federal, and the appointment of legislative chaplains, might well represent no involvements of the kind prohibited by the Establishment Clause. Legislators, federal and state, are mature adults who may presumably absent themselves from such public and ceremonial exercises without incurring any penalty, direct or indirect." *Schempp, supra*, at 299–300 (BRENNAN, J., concurring) (footnote omitted).

> "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute [at issue] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.*, at 612–613 (citations omitted).[3]

That the "purpose" of legislative prayer is pre-eminently religious rather than secular seems to me to be self-evident.[4] "To invoke Divine guidance on a public body entrusted with making the laws," *ante*, at 792, is nothing but a religious act. Moreover, whatever secular functions legislative prayer might play—formally opening the legislative session, getting the members of the body to quiet down, and imbuing them with a sense of seriousness and high purpose—could so plainly be performed in a purely nonreligious fashion that to claim a secular purpose for the prayer is an insult to the perfectly honorable individuals who instituted and continue the practice.

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[3] See, *e. g.*, *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116, 123 (1982); *Widmar* v. *Vincent*, 454 U. S. 263, 271 (1981); *Wolman* v. *Walter*, 433 U. S. 229, 236 (1977); *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 772–773 (1973).

[4] See *Stone* v. *Graham*, 449 U. S. 39, 41 (1980) (finding "pre-eminent purpose" of state statute requiring posting of Ten Commandments in each public school classroom to be "plainly religious in nature," despite legislative recitations of "supposed secular purpose"); *Epperson* v. *Arkansas*, 393 U. S. 97, 107–109 (1968) (state "anti-evolution" statute clearly religious in purpose); cf. *Schempp*, *supra*, at 223–224 (public school exercise consisting of Bible reading and recitation of Lord's Prayer).

As Reverend Palmer put the matter: "I would say that I strive to relate the Senators and their helpers to the divine." Palmer Deposition, at 28. "[M]y purpose is to provide an opportunity for Senators to be drawn closer to their understanding of God as they understand God. In order that the divine wisdom might be theirs as they conduct their business for the day." *Id.*, at 46. Cf. Prayers of the Chaplain of the Massachusetts Senate, 1963–1968, p. 58 (1969) (hereinafter Massachusetts Senate Prayers) ("Save this moment, O God, from merely being a gesture to custom").

The "primary effect" of legislative prayer is also clearly religious. As we said in the context of officially sponsored prayers in the public schools, "prescribing a particular form of religious worship," even if the individuals involved have the choice not to participate, places "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion . . . ." *Engel* v. *Vitale*, 370 U. S. 421, 431 (1962).[5] More importantly, invocations in Nebraska's legislative halls explicitly link religious belief and observance to the power and prestige of the State. "[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116, 125–126 (1982).[6] See *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 224 (1963).

Finally, there can be no doubt that the practice of legislative prayer leads to excessive "entanglement" between the State and religion. *Lemon* pointed out that "entanglement" can take two forms: First, a state statute or program might involve the state impermissibly in monitoring and overseeing religious affairs. 403 U. S., at 614–622.[7] In the case of legislative prayer, the process of choosing a "suitable" chaplain, whether on a permanent or rotating basis, and insuring that the chaplain limits himself or herself to "suitable" prayers, involves precisely the sort of supervision that agencies of government should if at all possible avoid.[8]

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[5] Cf. *Stone* v. *Graham*, *supra*, at 42.

The Court argues that legislators are adults, "presumably not readily susceptible to . . . peer pressure." *Ante*, at 792. I made a similar observation in my concurring opinion in *Schempp*. See n. 2, *supra*. Quite apart from the debatable constitutional significance of this argument, see *Schempp*, 374 U. S., at 224–225; *Engel* v. *Vitale*, 370 U. S., at 430, I am now most uncertain as to whether it is even factually correct: Legislators, by virtue of their instinct for political survival, are often loath to assert in public religious views that their constituents might perceive as hostile or nonconforming. See generally P. Blanshard, God and Man in Washington 94–106 (1960).

[6] As I point out *infra*, at 803–804, 808, official religious exercises may also be of significant symbolic *detriment* to religion.

Second, excessive "entanglement" might arise out of "the divisive political potential" of a state statute or program. 403 U. S., at 622.

> "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process." *Ibid.* (citations omitted).

In this case, this second aspect of entanglement is also clear. The controversy between Senator Chambers and his colleagues, which had reached the stage of difficulty and rancor long before this lawsuit was brought, has split the Nebraska

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[7] See *Larkin* v. *Grendel's Den, Inc., supra,* at 125, n. 9; *Walz* v. *Tax Comm'n,* 397 U. S. 664, 674–676 (1970).

[8] In *Lemon,* we struck down certain state statutes providing aid to sectarian schools, in part because "the program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity." 403 U. S., at 620. In this case, by the admission of the very government officials involved, supervising the practice of legislative prayer requires those officials to determine if particular members of the clergy and particular prayers are "too explicitly Christian," App. 49 (testimony of Rev. Palmer) or consistent with "the various religious preferences that the Senators may or may not have," *id.,* at 48 (same), or likely to "inject some kind of a religious dogma" into the proceedings, *id.,* at 68 (testimony of Frank Lewis, Chairman of the Nebraska Legislature Executive Board).

Legislature precisely on issues of religion and religious conformity. App. 21–24. The record in this case also reports a series of instances, involving legislators other than Senator Chambers, in which invocations by Reverend Palmer and others led to controversy along religious lines.[9] And in general, the history of legislative prayer has been far more eventful—and divisive—than a hasty reading of the Court's opinion might indicate.[10]

In sum, I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional.[11]

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[9] See *id.*, at 49 (testimony of Rev. Palmer) (discussing objections raised by some Senators to Christological references in certain of his prayers and in a prayer offered by a guest member of the clergy).

[10] As the Court points out, the practice of legislative prayers in Congress gave rise to serious controversy at points in the 19th century. *Ante*, at 788–789, n. 10. Opposition to the practice in that period arose "both on the part of certain radicals and of some rather extreme Protestant sects. These have been inspired by very different motives but have united in opposing government chaplaincies as breaking down the line of demarcation between Church and State. The sectarians felt that religion had nothing to do with the State, while the radicals felt that the State had nothing to do with religion." 3 A. Stokes, Church and State in the United States 130 (1950) (hereinafter Stokes). See also *id.*, at 133–134. Similar controversies arose in the States. See Report of the Select Committee of the New York State Assembly on the Several Memorials Against Appointing Chaplains to the Legislature (1832) (recommending that practice be abolished), reprinted in J. Blau, Cornerstones of Religious Freedom in America 141–156 (1949).

In more recent years, particular prayers and particular chaplains in the state legislatures have periodically led to serious political divisiveness along religious lines. See, *e. g.*, The Oregonian, Apr. 1, 1983, p. C8 ("Despite protests from at least one representative, a follower of an Indian guru was allowed to give the prayer at the start of Thursday's [Oregon] House [of Representatives] session. Shortly before Ma Anand Sheela began the invocation, about a half-dozen representatives walked off the House floor in apparent protest of the prayer"); Cal. Senate Jour., 37th Sess., 171–173, 307–308 (1907) (discussing request by a State Senator that State Senate Chaplain not use the name of Christ in legislative prayer, and response by one local clergyman claiming that the legislator who made the request had committed a "crowning infamy" and that his "words were those of an irreverent and godless man"). See also *infra*, at 805–806, 808, 818–821.

II

The path of formal doctrine, however, can only imperfectly capture the nature and importance of the issues at stake in this case. A more adequate analysis must therefore take into account the underlying function of the Establishment Clause, and the forces that have shaped its doctrine.

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[11] The *Lemon* tests do not, of course, exhaust the set of formal doctrines that can be brought to bear on the issues before us today. Last Term, for example, we made clear that a state program that discriminated *among* religious faiths, and not merely in favor of all religious faiths, "must be invalidated unless it is justified by a compelling governmental interest, cf. *Widmar* v. *Vincent*, 454 U. S. 263, 269–270 (1981), and unless it is closely fitted to further that interest, *Murdock* v. *Pennsylvania*, 319 U. S. 105, 116–117 (1943)." *Larson* v. *Valente*, 456 U. S. 228, 247 (1982). In this case, the appointment of a single chaplain for 16 years, and the evident impossibility of a Buddhist monk or Sioux Indian religious worker being appointed for a similar period, App. 69–70, see *post*, p. 822 (STEVENS, J., dissenting), might well justify application of the *Larson* test. Moreover, given the pains that petitioners have gone through to emphasize the "ceremonial" function of legislative prayer, Brief for Petitioners 16, and given the ease with which a similar "ceremonial" function could be performed without the necessity for prayer, cf. *supra*, at 797–798, I have little doubt that the Nebraska practice, at least, would fail the *Larson* test.

In addition, I still find compelling the Establishment Clause test that I articulated in *Schempp:*

> "What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice." 374 U. S., at 294–295.

See *Roemer* v. *Maryland Board of Public Works*, 426 U. S. 736, 770–771 (1976) (BRENNAN, J., dissenting); *Hunt* v. *McNair*, 413 U. S. 734, 750 (1973) (BRENNAN, J., dissenting); *Lemon* v. *Kurtzman*, 403 U. S., at 643 (BRENNAN, J., concurring); *Walz* v. *Tax Comm'n*, 397 U. S., at 680–681 (BRENNAN, J., concurring). For reasons similar to those I have already articulated, I believe that the Nebraska practice of legislative prayer, as well as most other comparable practices, would fail at least the second and third elements of this test.

A

Most of the provisions of the Bill of Rights, even if they are not generally enforceable in the absence of state action, nevertheless arise out of moral intuitions applicable to individuals as well as governments. The Establishment Clause, however, is quite different. It is, to its core, nothing less and nothing more than a statement about the proper role of *government* in the society that we have shaped for ourselves in this land.

The Establishment Clause embodies a judgment, born of a long and turbulent history, that, in our society, religion "must be a private matter for the individual, the family, and the institutions of private choice . . . ." *Lemon* v. *Kurtzman*, 403 U. S., at 625.

> "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson* v. *Arkansas*, 393 U. S. 97, 103–104 (1968) (footnote omitted).

"In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947), quoting *Reynolds* v. *United States*, 98 U. S. 145, 164 (1879).[12]

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[12] See also, *e. g.*, *Larkin* v. *Grendel's Den, Inc.*, 459 U. S., at 122–123; *Stone* v. *Graham*, 449 U. S., at 42; *Abington School Dist.* v. *Schempp*, 374 U. S., at 214–225; *id.*, at 232–234, 243–253 (BRENNAN, J., concurring).

The principles of "separation" and "neutrality" implicit in the Establishment Clause serve many purposes. Four of these are particularly relevant here.

The first, which is most closely related to the more general conceptions of liberty found in the remainder of the First Amendment, is to guarantee the individual right to conscience.[13] The right to conscience, in the religious sphere, is not only implicated when the government engages in direct or indirect coercion. It is also implicated when the government requires individuals to support the practices of a faith with which they do not agree.

> "'[T]o compel a man to furnish contributions of money for the propagation of [religious] opinions which he disbelieves, is sinful and tyrannical; . . . even . . . forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern . . . .'" *Everson* v. *Board of Education*, *supra*, at 13, quoting Virginia Bill for Religious Liberty, 12 Hening, Statutes of Virginia 84 (1823).

The second purpose of separation and neutrality is to keep the state from interfering in the essential autonomy of religious life, either by taking upon itself the decision of religious issues,[14] or by unduly involving itself in the supervision of religious institutions or officials.[15]

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[13] See, *e. g.*, *Larson* v. *Valente*, *supra*, at 244–247; *Schempp*, *supra*, at 222; *Torcaso* v. *Watkins*, 367 U. S. 488, 490, 494–496 (1961); *McDaniel* v. *Paty*, 435 U. S. 618, 636 (1978) (BRENNAN, J., concurring in judgment).

The Free Exercise Clause serves a similar function, though often in a quite different way. In particular, we have held that, under certain circumstances, an otherwise constitutional law may not be applied as against persons for whom the law creates a burden on religious belief or practice. See, *e. g.*, *Thomas* v. *Review Bd. of Indiana Employment Security Division*, 450 U. S. 707 (1981); *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972); *Sherbert* v. *Verner*, 374 U. S. 398 (1963).

The third purpose of separation and neutrality is to prevent the trivialization and degradation of religion by too close an attachment to the organs of government. The Establishment Clause "stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." *Engel* v. *Vitale*, 370 U. S., at 432, quoting Memorial and Remonstrance against Religious Assessments, 2 Writings of Madison 187. See also *Schempp*, 374 U. S., at 221–222; *id.*, at 283–287 (BRENNAN, J., concurring).[16]

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[14] See, *e. g.*, *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U. S. 440 (1969); *United States* v. *Ballard*, 322 U. S. 78 (1944).

[15] See *Lemon* v. *Kurtzman*, 403 U. S., at 614–622; *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 501–504 (1979).

This and the remaining purposes that I discuss cannot be reduced simply to a question of individual liberty. A court, for example, will refuse to decide an essentially religious issue even if the issue is otherwise properly before the court, and even if it is asked to decide it.

[16] Consider, in addition to the formal authorities cited in text, the following words by a leading Methodist clergyman:

"[Some propose] to reassert religious values by posting the Ten Commandments on every school-house wall, by erecting cardboard nativity shrines on every corner, by writing God's name on our money, and by using His Holy Name in political oratory. Is this not the ultimate in profanity?

. . . . .

"What is the result of all this display of holy things in public places? Does it make the market-place more holy? Does it improve people? Does it change their character or motives? On the contrary, the sacred symbols are thereby cheapened and degraded. The effect is often that of a television commercial on a captive audience—boredom and resentment." Kelley, Beyond Separation of Church and State, 5 J. Church & State 181, 190–191 (1963).

Consider also this condensed version of words first written in 1954 by one observer of the American scene:

"The manifestations of religion in Washington have become pretty thick. We have had opening prayers, Bible breakfasts, [and so on]; now we have

Finally, the principles of separation and neutrality help assure that essentially religious issues, precisely because of their importance and sensitivity, not become the occasion for battle in the political arena. See *Lemon*, 403 U. S., at 622–624; *Board of Education* v. *Allen*, 392 U. S. 236, 249 (Harlan, J., concurring); *Engel*, *supra*, at 429–430. With regard to most issues, the government may be influenced by partisan argument and may act as a partisan itself. In each case, there will be winners and losers in the political battle, and the losers' most common recourse is the right to dissent and the right to fight the battle again another day. With regard to matters that are essentially religious, however, the Establishment Clause seeks that there should be no political battles, and that no American should at any point feel alien-

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added . . . a change in the Pledge of Allegiance. The Pledge, which has served well enough in times more pious than ours, has now had its rhythm upset but its anti-Communist spirituality improved by the insertion of the phrase 'under God.' . . . A bill has been introduced directing the post office to cancel mail with the slogan 'Pray for Peace.' (The devout, in place of daily devotions, can just read what is stuck and stamped all over the letters in their mail.)

. . . . .

"To note all this in a deflationary tone is not to say that religion and politics don't mix. Politicians should develop deeper religious convictions, and religious folk should develop wiser political convictions; both need to relate political duties to religious faith—but not in an unqualified and public way that confuses the absolute and emotional loyalties of religion with the relative and shifting loyalties of politics.

. . . . .

"All religious affirmations are in danger of standing in contradiction to the life that is lived under them, but none more so than these general, inoffensive, and externalized ones which are put together for public purposes." W. Miller, Piety along the Potomac 41–46 (1964).

See also, *e. g.*, Prayer in Public Schools and Buildings—Federal Court Jurisdiction, Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 96th Cong., 2d Sess., 46–47 (1980) (testimony of M. William Howard, President of the National Council of the Churches of Christ in the U. S. A.) (hereinafter Hearings); cf. Fox, The National Day of Prayer, 29 Theology Today 258 (1972).

ated from his government because that government has declared or acted upon some "official" or "authorized" point of view on a matter of religion.[17]

B

The imperatives of separation and neutrality are not limited to the relationship of government to religious institutions or denominations, but extend as well to the relationship of government to religious beliefs and practices. In *Torcaso* v. *Watkins*, 367 U. S. 488 (1961), for example, we struck down a state provision requiring a religious oath as a qualification to hold office, not only because it violated principles of free exercise of religion, but also because it violated the principles of nonestablishment of religion. And, of course, in the pair of cases that hang over this one like a reproachful set of parents, we held that official prayer and prescribed Bible reading in the public schools represent a serious encroachment on the Establishment Clause. *Schempp, supra; Engel, supra.* As we said in *Engel*, "[i]t is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." 370 U. S., at 435 (footnote omitted).

Nor should it be thought that this view of the Establishment Clause is a recent concoction of an overreaching judiciary. Even before the First Amendment was written, the Framers of the Constitution broke with the practice of the Articles of Confederation and many state constitutions, and did not invoke the name of God in the document. This "omission of a reference to the Deity was not inadvertent; nor did it remain unnoticed."[18] Moreover, Thomas Jefferson and Andrew Jackson, during their respective terms as President, both refused on Establishment Clause grounds to declare national days of thanksgiving or fasting.[19] And James Madison, writing subsequent to his own Presidency on essentially the very issue we face today, stated:

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[17] It is sometimes argued that to apply the Establishment Clause alienates those who wish to see a tighter bond between religion and state. This is obviously true. (I would vigorously deny, however, any claim that the Establishment Clause disfavors the much broader class of persons for whom religion is a necessary and important part of life. See *supra*, at 803–804; *infra*, at 821–822.) But I would submit that even this dissatisfaction is tempered by the knowledge that society is adhering to a fixed rule of neutrality rather than rejecting a particular expression of religious belief.

> "Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principle of religious freedom?
>
> "In strictness, the answer on both points must be in the negative. The Constitution of the U. S. forbids everything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of

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[18] Pfeffer, The Deity in American Constitutional History, 23 J. Church & State 215, 217 (1981). See also 1 Stokes 523.

[19] See L. Pfeffer, Church, State, and Freedom 266 (rev. ed. 1967) (hereinafter Pfeffer). Jefferson expressed his views as follows:

"'I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. [I]t is only proposed that I should recommend not prescribe a day of fasting and prayer. [But] I do not believe it is for the interest of religion to invite the civil magistrate to direct its exercises, its discipline, or its doctrine . . . . Fasting and prayer are religious exercises; the enjoining of them an act of discipline. Every religious society has a right to determine for itself the times for these exercises, and the objects proper for them, according to their own particular tenets; and the right can never be safer than in their hands, where the Constitution has deposited it.'" *Ibid.*, quoting 11 Jefferson's Writings 428–430 (Monticello ed. 1905).

> them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well as of the representative Body, approved by the majority, and conducted by Ministers of religion paid by the entire nation." Fleet, Madison's "Detached Memoranda," 3 Wm. & Mary Quarterly 534, 558 (1946).

C

Legislative prayer clearly violates the principles of neutrality and separation that are embedded within the Establishment Clause. It is contrary to the fundamental message of *Engel* and *Schempp*. It intrudes on the right to conscience by forcing some legislators either to participate in a "prayer opportunity," *ante*, at 794, with which they are in basic disagreement, or to make their disagreement a matter of public comment by declining to participate. It forces all residents of the State to support a religious exercise that may be contrary to their own beliefs. It requires the State to commit itself on fundamental theological issues.[20] It has the potential for degrading religion by allowing a religious call to worship to be intermeshed with a secular call to order. And it injects religion into the political sphere by creating the potential that each and every selection of a chaplain, or consideration of a particular prayer, or even reconsideration of the practice itself, will provoke a political battle along religious lines and ultimately alienate some religiously identified group of citizens.[21]

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[20] See also *infra*, at 819–821.

[21] In light of the discussion in text, I am inclined to agree with the Court that the Nebraska practice of legislative prayer is not significantly more troubling than that found in other States. For example, appointing one chaplain for 16 years may give the impression of "establishing" one particular religion, but the constant attention to the selection process which would be the result of shorter terms might well increase the opportunity for reli-

D

One response to the foregoing account, of course, is that "neutrality" and "separation" do not exhaust the full meaning of the Establishment Clause as it has developed in our cases. It is indeed true that there are certain tensions inherent in the First Amendment itself, or inherent in the role of religion and religious belief in any free society, that have shaped the doctrine of the Establishment Clause, and required us to deviate from an absolute adherence to separation and neutrality. Nevertheless, these considerations, although very important, are also quite specific, and where none of them is present, the Establishment Clause gives us no warrant simply to look the other way and treat an unconstitutional practice as if it were constitutional. Because the Court occasionally suggests that some of these considerations might apply here, it becomes important that I briefly identify the most prominent of them and explain why they do not in fact have any relevance to legislative prayer.

(1)

A number of our cases have recognized that religious institutions and religious practices may, in certain contexts, receive the benefit of government programs and policies generally available, on the basis of some secular criterion, to a wide class of similarly situated nonreligious beneficiaries,[22] and the precise cataloging of those contexts is not necessarily an easy task. I need not tarry long here, however, because the provision for a daily official invocation by a nonmember officer of

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gious discord and entanglement. The lesson I draw from all this, however, is that any regular practice of official invocational prayer must be deemed unconstitutional.

[22] See, *e. g.*, *Everson* v. *Board of Education*, 330 U. S. 1 (1947) (transportation of students to and from school); *Walz* v. *Tax Comm'n*, 397 U. S. 664 (1970) (charitable tax exemptions).

a legislative body could by no stretch of the imagination appear anywhere in that catalog.

(2)

Conversely, our cases have recognized that religion can encompass a broad, if not total, spectrum of concerns, overlapping considerably with the range of secular concerns, and that not every governmental act which coincides with or conflicts with a particular religious belief is for that reason an establishment of religion. See, *e. g.*, *McGowan* v. *Maryland*, 366 U. S. 420, 431–445 (1961) (Sunday Laws); *Harris* v. *McRae*, 448 U. S. 297, 319–320 (1980) (abortion restrictions). The Court seems to suggest at one point that the practice of legislative prayer may be excused on this ground, *ante*, at 792, but I cannot really believe that it takes this position seriously.[23] The practice of legislative prayer is nothing like the statutes we considered in *McGowan* and *Harris* v. *McRae;* prayer is not merely "conduct whose . . . effect . . . harmonize[s] with the tenets of some or all religions," *McGowan*, *supra*, at 442; prayer is fundamentally and necessarily religious. "It is prayer which distinguishes religious phenomena from all those which resemble them or lie near to them, from the moral sense, for instance, or aesthetic feeling."[24] Accord, *Engel*, 370 U. S., at 424.

(3)

We have also recognized that government cannot, without adopting a decidedly *anti*-religious point of view, be forbidden to recognize the religious beliefs and practices of the American people as an aspect of our history and culture.[25] Certainly, bona fide classes in comparative religion can be offered in the public schools.[26] And certainly, the text of Abraham Lincoln's Second Inaugural Address which is inscribed on a wall of the Lincoln Memorial need not be purged of its profound theological content. The practice of offering invocations at legislative sessions cannot, however, simply be dismissed as "a tolerable *acknowledgment of beliefs* widely held among the people of this country." *Ante*, at 792 (emphasis added). "Prayer is religion *in act*."[27] "Praying means to take hold of a word, the end, so to speak, of a line that leads to God."[28] Reverend Palmer and other members of the clergy who offer invocations at legislative sessions are not museum pieces put on display once a day for the edification of the legislature. Rather, they are engaged by the legislature to lead it—as a body—in an act of religious worship. If upholding the practice requires denial of this fact, I suspect that many supporters of legislative prayer would feel that they had been handed a pyrrhic victory.

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[23] The Court does sensibly, if not respectfully, ascribe this view to the Founding Fathers rather than to itself. See *ante*, at 792.

[24] A. Sabatier, Outlines of a Philosophy of Religion 25–26 (T. Seed trans., 1957 ed.). See also, *e. g.*, W. James, The Varieties of Religious Experience 352–353 (New American Library ed., 1958); F. Heiler, Prayer xiii–xvi (S. McComb trans., 1958 ed.).

(4)

Our cases have recognized that the purposes of the Establishment Clause can sometimes conflict. For example, in *Walz* v. *Tax Comm'n*, 397 U. S. 664 (1970), we upheld tax exemptions for religious institutions in part because subjecting those institutions to taxation might foster serious administrative entanglement. *Id.*, at 674–676. Here, however, no such tension exists; the State can vindicate *all* the purposes of the Establishment Clause by abolishing legislative prayer.

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[25] See *Schempp*, 374 U. S., at 300–304 (BRENNAN, J., concurring); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, 235–236 (1948) (Jackson, J., concurring).

[26] See *Schempp*, *supra*, at 225.

[27] Sabatier, *supra*, at 25 (emphasis added).

[28] A. Heschel, Man's Quest for God 30 (1954).

(5)

Finally, our cases recognize that, in one important respect, the Constitution is *not* neutral on the subject of religion: Under the Free Exercise Clause, religiously motivated claims of conscience may give rise to constitutional rights that other strongly held beliefs do not. See n. 13, *supra*. Moreover, even when the government is not compelled to do so by the Free Exercise Clause, it may to some extent act to facilitate the opportunities of individuals to practice their religion.[29] See *Schempp*, 374 U. S., at 299 (BRENNAN, J., concurring) ("hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion"). This is not, however, a case in which a State is accommodating individual religious interests. We are not faced here with the right of the legislature to allow its members to offer prayers during the course of general legislative debate. We are certainly not faced with the right of legislators to form voluntary groups for prayer or worship. We are not even faced with the right of the State to employ members of the clergy to minister to the private religious needs of individual legislators. Rather, we are faced here with the regularized practice of conducting official prayers, on behalf of the entire legislature, as part of the order of business constituting the formal opening of every single session of the legislative term. If this is free exercise, the Establishment Clause has no meaning whatsoever.

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[29] Justice Douglas' famous observation that "[w]e are a religious people whose institutions presuppose a Supreme Being," *Zorach* v. *Clauson*, 343 U. S., at 313, see *ante*, at 792, arose in precisely such a context. Indeed, a more complete quotation from the paragraph in which that statement appears is instructive here:

"We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. . . . The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here." 343 U. S., at 313–314.

III

With the exception of the few lapses I have already noted, each of which is commendably qualified so as to be limited to the facts of this case, the Court says almost nothing contrary to the above analysis. Instead, it holds that "the practice of opening legislative sessions with prayer has become part of the fabric of our society," *ante*, at 792, and chooses not to interfere. I sympathize with the Court's reluctance to strike down a practice so prevalent and so ingrained as legislative prayer. I am, however, unconvinced by the Court's arguments, and cannot shake my conviction that legislative prayer violates both the letter and the spirit of the Establishment Clause.

A

The Court's main argument for carving out an exception sustaining legislative prayer is historical. The Court cannot—and does not—purport to find a pattern of "undeviating acceptance," *Walz*, *supra*, at 681 (BRENNAN, J., concurring), of legislative prayer. See *ante*, at 791, and n. 12; n. 10, *supra*. It also disclaims exclusive reliance on the mere longevity of legislative prayer. *Ante*, at 790. The Court does, however, point out that, only three days before the First Congress reached agreement on the final wording of the Bill of Rights, it authorized the appointment of paid chaplains for its own proceedings, *ante*, at 788, and the Court argues that in light of this "unique history," *ante*, at 791, the actions of Congress reveal its intent as to the meaning of the Establishment Clause, *ante*, at 788–790. I agree that historical practice is "of considerable import in the interpretation of abstract constitutional language," *Walz*, 397 U. S., at 681 (BRENNAN, J., concurring). This is a case, however, in which—absent the Court's invocation of history—there would be no question that the practice at issue was unconstitutional. And despite the surface appeal of the Court's argument, there are at least three reasons why specific historical practice should not in this case override that clear constitutional imperative.[30]

First, it is significant that the Court's historical argument does not rely on the legislative history of the Establishment Clause itself. Indeed, that formal history is profoundly unilluminating on this and most other subjects. Rather, the Court assumes that the Framers of the Establishment Clause would not have themselves authorized a practice that they thought violated the guarantees contained in the Clause. *Ante*, at 790. This assumption, however, is questionable. Legislators, influenced by the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business, do not always pass sober constitutional judgment on every piece of legislation they enact,[31] and this

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[30] Indeed, the sort of historical argument made by the Court should be advanced with some hesitation in light of certain other skeletons in the congressional closet. See, *e. g.*, An Act for the Punishment of certain Crimes against the United States, § 16, 1 Stat. 116 (1790) (enacted by the First Congress and requiring that persons convicted of certain theft offenses "be publicly whipped, not exceeding thirty-nine stripes"); Act of July 23, 1866, 14 Stat. 216 (reaffirming the racial segregation of the public schools in the District of Columbia; enacted exactly one week after Congress proposed Fourteenth Amendment to the States).

[31] See generally D. Morgan, Congress and the Constitution (1966); E. Eidenberg & R. Morey, An Act of Congress (1969); cf. C. Miller, The Supreme Court and the Uses of History 61–64 (1969).

One commentator has pointed out that the chaplaincy established by the First Congress was "a carry-over from the days of the Continental Conmust be assumed to be as true of the Members of the First Congress as any other. Indeed, the fact that James Madison, who voted for the bill authorizing the payment of the first congressional chaplains, *ante*, at 788, n. 8, later expressed the view that the practice was unconstitutional, see *supra*, at 807–808, is instructive on precisely this point. Madison's later views may not have represented so much a change of *mind* as a change of *role*, from a Member of Congress engaged in the hurly-burly of legislative activity to a detached observer engaged in unpressured reflection. Since the latter role is precisely the one with which this Court is charged, I am not at all sure that Madison's later writings should be any less influential in our deliberations than his earlier vote.

Second, the Court's analysis treats the First Amendment simply as an Act of Congress, as to whose meaning the intent of Congress is the single touchstone. Both the Constitution and its Amendments, however, became supreme law only by virtue of their ratification by the States, and the understanding of the States should be as relevant to our analysis as the understanding of Congress.[32] See *Richardson* v. *Ramirez*, 418 U. S. 24, 43 (1974); *Maxwell* v. *Dow*, 176 U. S. 581, 602 (1900).[33] This observation is especially compelling in consid-

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gress, which . . . exercised plenary jurisdiction in matters of religion; and ceremonial practices such as [this] are not easily dislodged after becoming so firmly established." Pfeffer 170.

[32] As a practical matter, "we know practically nothing about what went on in the state legislatures" during the process of ratifying the Bill of Rights. 2 B. Schwartz, The Bill of Rights: A Documentary History 1171 (1971). Moreover, looking to state practices is, as the Court admits, *ante*, at 787, n. 5, of dubious relevance because the Establishment Clause did not originally apply to the States. Nevertheless, these difficulties give us no warrant to give controlling weight on the constitutionality of a specific practice to the collateral acts of the Members of Congress who proposed the Bill of Rights to the States.

[33] See also 1 J. Story, Commentaries on the Constitution § 406 (1st ed., 1833); Fleet, Madison's "Detached Memoranda," 3 Wm. & Mary Quarterly 534, 544 (1946); Wofford, The Blinding Light: The Uses of History in Constitutional Interpretation, 31 U. Chi. L. Rev. 502, 508–509 (1964).

ering the meaning of the Bill of Rights. The first 10 Amendments were not enacted because the Members of the First Congress came up with a bright idea one morning; rather, their enactment was forced upon Congress by a number of the States as a condition for their ratification of the original Constitution.[34] To treat any practice authorized by the First Congress as presumptively consistent with the Bill of Rights is therefore somewhat akin to treating any action of a party to a contract as presumptively consistent with the terms of the contract. The latter proposition, if it were accepted, would of course resolve many of the heretofore perplexing issues in contract law.

Finally, and most importantly, the argument tendered by the Court is misguided because the Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers. We have recognized in a wide variety of constitutional contexts that the practices that were in place at the time any particular guarantee was enacted into the Constitution do not necessarily fix forever the meaning of that guarantee.[35] To be truly faithful to the Framers, "our use of the history of their time must limit itself to broad purposes, not specific practices." *Abington School Dist.* v. *Schempp*, 374 U. S., at 241 (BRENNAN, J., concurring). Our primary task must be to translate "the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century . . . ." *West Virginia Bd. of Education* v. *Barnette*, 319 U. S. 624, 639 (1943).

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[34] See generally 1 Annals of Cong. 431–433, 662, 730 (1789); *Barron* v. *Mayor and City Council of Baltimore*, 7 Pet. 243, 250 (1833); E. Dumbauld, The Bill of Rights and What it Means Today 10–34 (1957); 2 Schwartz, *supra*, at 697–980, 983–984.

[35] See, *e. g.*, *Frontiero* v. *Richardson*, 411 U. S. 677 (1973) (gender discrimination); *Brown* v. *Board of Education*, 347 U. S. 483 (1954) (race discrimination); *Colgrove* v. *Battin*, 413 U. S. 149, 155–158 (1973) (jury trial); *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (cruel and unusual punishment); *Katz* v. *United States*, 389 U. S. 347 (1967) (search and seizure).

The inherent adaptability of the Constitution and its amendments is particularly important with respect to the Establishment Clause. "[O]ur religious composition makes us a vastly more diverse people than were our forefathers. . . . In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike." *Schempp*, *supra*, at 240–241 (BRENNAN, J., concurring). Cf. *McDaniel* v. *Paty*, 435 U. S. 618, 628 (1978) (plurality opinion). President John Adams issued during his Presidency a number of official proclamations calling on all Americans to engage in Christian prayer.[36] Justice Story, in his treatise on the Constitution, contended that the "real object" of the First Amendment "was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects . . . ."[37] Whatever deference Adams' actions and Story's views might once have deserved in this Court, the Establishment Clause must now be read in a very different light. Similarly, the Members of the First Congress should be treated, not as sacred figures whose every action must be emulated, but as the authors of a document meant to last for the ages. Indeed, a proper respect for the Framers themselves forbids us to give so static and lifeless a meaning to their work. To my mind, the Court's focus here on a narrow piece of history is, in a fundamental sense, a betrayal of the lessons of history.

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[36] See Pfeffer 266; 1 Stokes 513.

[37] 3 Story, *supra*, § 1871. Cf. *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 470–471 (1892); *Vidal* v. *Girard's Executors*, 2 How. 127, 197–199 (1844).

B

Of course, the Court does not rely entirely on the practice of the First Congress in order to validate legislative prayer. There is another theme which, although implicit, also pervades the Court's opinion. It is exemplified by the Court's comparison of legislative prayer with the formulaic recitation of "God save the United States and this Honorable Court." *Ante*, at 786. It is also exemplified by the Court's apparent conclusion that legislative prayer is, at worst, a "'mere shadow'" on the Establishment Clause rather than a "'real threat'" to it. *Ante*, at 795, quoting *Schempp*, *supra*, at 308 (Goldberg, J., concurring). Simply put, the Court seems to regard legislative prayer as at most a *de minimis* violation, somehow unworthy of our attention. I frankly do not know what should be the proper disposition of features of our public life such as "God save the United States and this Honorable Court," "In God We Trust," "One Nation Under God," and the like. I might well adhere to the view expressed in *Schempp* that such mottos are consistent with the Establishment Clause, not because their import is *de minimis*, but because they have lost any true religious significance. 374 U. S, at 303–304 (BRENNAN, J., concurring). Legislative invocations, however, are very different.

First of all, as JUSTICE STEVENS' dissent so effectively highlights, legislative prayer, unlike mottos with fixed wordings, can easily turn narrowly and obviously sectarian.[38] I agree with the Court that the federal judiciary should not sit as a board of censors on individual prayers, but to my mind the better way of avoiding that task is by striking down all official legislative invocations.

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[38] Indeed, the prayers said by Reverend Palmer in the Nebraska Legislature *are* relatively "nonsectarian" in comparison with some other examples. See, *e. g.*, Massachusetts Senate Prayers 11, 14–17, 71–73, 108; Invocations by Rev. Fred S. Holloman, Chaplain of the Kansas Senate, 1980–1982 Legislative Sessions, pp. 40–41, 46–47, 101–102, 106–107.

More fundamentally, however, *any* practice of legislative prayer, even if it might look "nonsectarian" to nine Justices of the Supreme Court, will inevitably and continuously involve the State in one or another religious debate.[39] Prayer is serious business—serious theological business—and it is not a mere "acknowledgment of beliefs widely held among the people of this country" for the State to immerse itself in that business.[40] Some religious individuals or groups find it theologically problematic to engage in joint religious exercises predominantly influenced by faiths not their own.[41] Some might object even to the attempt to fashion a "nonsectarian" prayer.[42] Some would find it impossible to participate in any "prayer opportunity," *ante*, at 794, marked by

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[39] See generally Cahn, On Government and Prayer, 37 N. Y. U. L. Rev. 981 (1962); Hearings, at 47 (testimony of M. Howard) ("there is simply no such thing as 'nonsectarian' prayer . . .").

Cf. N. Y. Times, Sept. 4, 1982, p. 8, col. 2 ("Mr. [Jerry] Falwell [founder of the organization "Moral Majority"] is quoted as telling a meeting of the Religious Newswriters Association in New Orleans that because members of the Moral Majority represented a variety of denominations, 'if we ever opened a Moral Majority meeting with prayer, silent or otherwise, we would disintegrate' ").

[40] I put to one side, not because of its irrelevance, but because of its obviousness, the fact that any official prayer will pose difficulties both for nonreligious persons and for religious persons whose faith does not include the institution of prayer, see, *e. g.*, H. Smith, The Religions of Man 138 (Perennial Library ed. 1965) (discussing Theravada Buddhism).

[41] See, *e. g.*, Hearings, at 46–47 (testimony of M. Howard) ("We are told that [school] prayers could be 'nonsectarian,' or that they could be offered from various religious traditions in rotation. I believe such a solution is least acceptable to those most fervently devoted to their own religion"); S. Freehof, Modern Reform Responsa 71 (1971) (ecumenical services not objectionable in principle, but they should not take place too frequently); J. Bancroft, Communication in Religious Worship with Non-Catholics (1943).

[42] See, *e. g.*, Hearings, at 47 (testimony of M. Howard) (nonsectarian prayer, even if were possible, would likely be "offensive to devout members of all religions").

Trinitarian references.[43] Some would find a prayer *not* invoking the name of Christ to represent a flawed view of the relationship between human beings and God.[44] Some might find any petitionary prayer to be improper.[45] Some might find any prayer that lacked a petitionary element to be deficient.[46] Some might be troubled by what they consider shallow public prayer,[47] or nonspontaneous prayer,[48] or prayer without adequate spiritual preparation or concentration.[49] Some might, of course, have *theological* objections to any prayer sponsored by an organ of government.[50] Some might object on theological grounds to the level of political neutrality generally expected of government-sponsored invocational prayer.[51] And some might object on theological grounds to the Court's requirement, *ante*, at 794, that prayer, even though religious, not be proselytizing.[52] If these problems arose in the context of a religious objection to some otherwise decidedly secular activity, then whatever remedy there is would have to be found in the Free Exercise Clause. See n. 13, *supra*. But, in this case, we are faced with potential religious objections to an activity at the very center of religious life, and it is simply beyond the competence of government, and inconsistent with our conceptions of liberty, for the State to take upon itself the role of ecclesiastical arbiter.

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[43] See, *e. g.*, S. Freehof, Reform Responsa 115 (1960).

[44] See, *e. g.*, D. Bloesch, The Struggle of Prayer 36–37 (1980) (hereinafter Bloesch) ("Because our Savior plays such a crucial role in the life of prayer, we should always pray having in mind his salvation and intercession. We should pray not only in the spirit of Christ but also in the name of Christ. . . . To pray in his name means that we recognize that our prayers cannot penetrate the tribunal of God unless they are presented to the Father by the Son, our one Savior and Redeemer"); cf. Fischer, The Role of Christ in Christian Prayer, 41 Encounter 153, 155–156 (1980).

As the Court points out, Reverend Palmer eliminated the Christological references in his prayers after receiving complaints from some of the State Senators. *Ante*, at 793, n. 14. Suppose, however, that Reverend Palmer had said that he could not in good conscience omit some references. Should he have been dismissed? And, if so, what would have been the implications of *that* action under both the Establishment and the Free Exercise Clauses?

[45] See, *e. g.*, Meister Eckhart 88–89 (R. Blakney trans. 1941); T. Merton, Contemplative Prayer (1971); J. Williams, What Americans Believe and How they Worship 412–413 (3d ed. 1969) (hereinafter Williams) (discussing Christian Science belief that only proper prayer is prayer of communion).

[46] See, *e. g.*, Bloesch 72–73; Stump, Petitionary Prayer, 16 Am. Philosophical Q. 81 (1979); Wells, Prayer: Rebelling Against the Status Quo, Christianity Today, Nov. 2, 1979, pp. 32–34.

[47] See, *e. g.*, Matthew 6:6 ("But thou, when thou prayest, enter into thy closet, and when thou hast shut thy door, pray to thy Father which is in secret; and thy Father which seeth in secret shall reward thee openly").

[48] See, *e. g.*, Williams 274–275 (discussing traditional Quaker practice).

[49] See, *e. g.*, Heschel, *supra* n. 28, at 53; Heiler, *supra* n. 24, at 283–285.

[50] See, *e. g.*, Williams 256; 3 Stokes 133–134; Hearings, at 65–66 (statement of Baptist Joint Committee on Public Affairs).

IV

The argument is made occasionally that a strict separation of religion and state robs the Nation of its spiritual identity. I believe quite the contrary. It may be true that individuals cannot be "neutral" on the question of religion.[53] But the judgment of the Establishment Clause is that neutrality by the organs of *government* on questions of religion is both possible and imperative. Alexis de Tocqueville wrote the following concerning his travels through this land in the early 1830's:

> "The religious atmosphere of the country was the first thing that struck me on arrival in the United States. . . .
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> "In France I had seen the spirits of religion and of freedom almost always marching in opposite directions. In America I found them intimately linked together in joint reign over the same land.

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[51] See, *e. g.*, R. Niebuhr, Faith and Politics 100 (R. Stone ed. 1968) ("A genuinely prophetic religion speaks a word of judgment against every ruler and every nation, even against good rulers and good nations").

[52] See, *e. g.*, Bloesch 159 ("World evangelization is to be numbered among the primary goals in prayer, since the proclaiming of the gospel is what gives glory to God").

[53] See W. James, The Will to Believe 1–31 (1st ed. 1897).

> "My longing to understand the reason for this phenomenon increased daily.
>
> "To find this out, I questioned the faithful of all communions; I particularly sought the society of clergymen, who are the depositaries of the various creeds and have a personal interest in their survival. . . . I expressed my astonishment and revealed my doubts to each of them; I found that they all agreed with each other except about details; all thought that the main reason for the quiet sway of religion over their country was the complete separation of church and state. I have no hesitation in stating that throughout my stay in America I met nobody, lay or cleric, who did not agree about that." Democracy in America 295 (G. Lawrence trans., J. Mayer ed., 1969).

More recent history has only confirmed De Tocqueville's observations.[54] If the Court had struck down legislative prayer today, it would likely have stimulated a furious reaction. But it would also, I am convinced, have invigorated both the "spirit of religion" and the "spirit of freedom."

I respectfully dissent.

JUSTICE STEVENS, dissenting.

In a democratically elected legislature, the religious beliefs of the chaplain tend to reflect the faith of the majority of the lawmakers' constituents. Prayers may be said by a Catholic priest in the Massachusetts Legislature and by a Presbyterian minister in the Nebraska Legislature, but I would not expect to find a Jehovah's Witness or a disciple of Mary Baker Eddy or the Reverend Moon serving as the official chaplain in any state legislature. Regardless of the motivation of the majority that exercises the power to appoint the chaplain,[1] it seems plain to me that the designation of a member of one religious faith to serve as the sole official chaplain of a state legislature for a period of 16 years constitutes the preference of one faith over another in violation of the Establishment Clause of the First Amendment.

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[54] See generally J. Murray, We Hold These Truths 73–74 (1960) (American religion "has benefited . . . by the maintenance, even in exaggerated form, of the distinction between church and state"); Martin, Revived Dogma and New Cult, 111 Daedalus 53, 54–55 (1982) (The "icy thinness of religion in the cold airs of Northwest Europe and in the vapors of Protestant England is highly significant, because it represents a fundamental difference in the Protestant world between North America and the original exporting countries. In all those countries with stable monarchies and Protestant state churches, [religious] institutional vitality is low. In North America, lacking either monarchy or state church, it is high" (footnote omitted)).

The Court declines to "embark on a sensitive evaluation or to parse the content of a particular prayer." *Ante,* at 795. Perhaps it does so because it would be unable to explain away the clearly sectarian content of some of the prayers given by Nebraska's chaplain.[2] Or perhaps the Court is unwilling to

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[1] The Court holds that a chaplain's 16-year tenure is constitutional as long as there is no proof that his reappointment "stemmed from an impermissible motive." *Ante,* at 793. Thus, once again, the Court makes the subjective motivation of legislators the decisive criterion for judging the constitutionality of a state legislative practice. Cf. *Rogers* v. *Lodge,* 458 U. S. 613 (1982), and *City of Mobile* v. *Bolden,* 446 U. S. 55 (1980). Although that sort of standard maximizes the power of federal judges to review state action, it is not conducive to the evenhanded administration of the law. See 458 U. S., at 642–650 (STEVENS, J., dissenting); 446 U. S., at 91–94 (STEVENS, J., concurring in judgment).

[2] On March 20, 1978, for example, Chaplain Palmer gave the following invocation:

"Father in heaven, the suffering and death of your son brought life to the whole world moving our hearts to praise your glory. The power of the cross reveals your concern for the world and the wonder of Christ crucified.

"'The days of his life-giving death and glorious resurrection are approaching. This is the hour when he triumphed over Satan's pride; the time when we celebrate the great event of our redemption.

[Footnote 2 is continued on p. 824]

acknowledge that the tenure of the chaplain must inevitably be conditioned on the acceptability of that content to the silent majority.

I would affirm the judgment of the Court of Appeals.

"We are reminded of the price he paid when we pray with the Psalmist:

"'My God, my God, why have you forsaken me, far from my prayer, from the words of my cry?

"'O my God, I cry out by day, and you answer not; by night, and there is no relief for me.

"'Yet you are enthroned in the Holy Place, O glory of Israel!

"'In you our fathers trusted; they trusted, and you delivered them.

"'To you they cried, and they escaped; in you they trusted, and they were not put to shame.

"'But I am a worm, not a man; the scorn of men, despised by the people.

"'All who see me scoff at me; they mock me with parted lips, they wag their heads:

"'He relied on the Lord; let Him deliver him, let Him rescue him, if He loves him.' Amen." App. 103–104.

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 610, AFL–CIO, ET AL. *v.* SCOTT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 82–486. Argued April 26, 1983—Decided July 5, 1983

Respondent construction company hired nonunion workers for a project near Port Arthur, Tex., and a citizen protest against the company's hiring practice was organized at a meeting held by the Executive Committee of the Sabine Area Building and Construction Trades Council. During the protest at the construction site, company employees (including the two individual respondents) were assaulted and beaten and construction equipment was burned and destroyed. The violence and vandalism delayed construction and led the company to default on its contract. In their action in Federal District Court against petitioners—the Sabine Area Building and Construction Trades Council and certain local unions and individuals—respondents asserted that petitioners had conspired to deprive respondents of their legally protected rights, contrary to the provisions of 42 U. S. C. § 1985(3) (1976 ed., Supp. V) making available a cause of action to those injured by conspiracies formed "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." The District Court entered judgment for respondents, granting injunctive relief and awarding damages. The Court of Appeals affirmed in pertinent part, holding that the purpose of the conspiracy was to deprive respondents of their First Amendment right not to associate with a union, that for purposes of § 1985(3) it was not necessary to show some state involvement in the infringement of First Amendment rights, and that § 1985(3) reaches conspiracies motivated by political or economic bias as well as those motivated by racial bias, thus including the conspiracy to harm the nonunion employees of the nonunion contractor.

Held: An alleged conspiracy to infringe First Amendment rights is not a violation of § 1985(3) unless it is proved that the State is involved in the conspiracy or the aim of the conspiracy is to influence the activity of the State. Moreover, the kind of animus that § 1985(3) requires is not present in this case. Pp. 830–839.

(a) *Griffin* v. *Breckenridge*, 403 U. S. 88, upheld the application of § 1985(3) to purely private conspiracies aimed at interfering with rights constitutionally protected against private as well as official encroachment, such as the rights involved in that case—the right to travel and Thirteenth Amendment rights. However, *Griffin* did not hold or declare that when the alleged conspiracy is aimed at a right that is by definition only a right against state interference, such as First and Fourteenth Amendment rights, the plaintiff in a § 1985(3) suit nevertheless need not prove that the conspiracy contemplated state involvement of some sort. Pp. 831–834.

(b) The language and legislative history of § 1985(3) establish that it requires "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin, supra,* at 102. Pp. 834–835.

(c) Though the predominant purpose of § 1985(3) was to combat the then-prevalent animus against Negroes and their supporters, it is not necessary to determine here whether § 1985(3) must be construed to reach only cases involving racial bias. Pp. 835–837.

(d) Even if it is assumed that § 1985(3) is to be construed to reach conspiracies aimed at any class or organization on account of its political views or activities, the provision does not reach conspiracies motivated by bias towards others on account of their *economic* views, status, or activities. Neither the language nor the legislative history of § 1985(3) compels a construction that would include group action resting on economic or commercial animus, such as animus in favor of or against unionization. Pp. 837–839.

680 F. 2d 979, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and O'CONNOR, JJ., joined, *post,* p. 839.

Laurence Gold argued the cause for petitioners. With him on the briefs were *Martin W. Dies* and *George Kaufmann.*

Robert Q. Keith argued the cause for respondents. With him on the brief were *Lino A. Graglia* and *John H. Smither.**

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*Briefs of *amici curiae* urging affirmance were filed by *Burt Neuborne* for the American Civil Liberties Union; by *Tom Martin Davis, Jr.,* for Associated Builders & Contractors, Inc.; by *Robert T. Thompson, Melvin R. Hutson,* and *Stephen A. Bokat* for the Chamber of Commerce of the United States; by *David Crump* for the Legal Foundation of America; and by *Rex H. Reed* for the National Right to Work Legal Defense Foundation.

JUSTICE WHITE, delivered the opinion of the Court.

This case concerns the scope of the cause of action made available by 42 U. S. C. § 1985(3) (1976 ed., Supp. V)* to those injured by conspiracies formed "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."

I

A. A. Cross Construction Co., Inc. (Cross), contracted with the Department of the Army to construct the Alligator Bayou Pumping Station and Gravity Drainage Structure on the Taylor Bayou Hurricane Levee near Port Arthur, Tex. In accordance with its usual practice, Cross hired workers for the project without regard to union membership. Some of them were from outside the Port Arthur area. Employees of Cross were several times warned by local residents that Cross' practice of hiring nonunion workers was a matter of serious concern to many in the area and that it could lead to trouble. According to the District Court, the evidence showed that at a January 15, 1975, meeting of the Executive Committee of the Sabine Area Building and Construction Trades Council a citizen protest against Cross' hiring practices was discussed and a time and place for the protest were chosen. On the morning of January 17, a large group assembled at the entrance to the Alligator Bayou construction site. In the group were union members present at the January 15 meeting. From this gathering several truckloads of men emerged, drove on to the construction site, assaulted and beat Cross employees, and burned and destroyed construction equipment. The District Court found that continued violence was threatened "if the nonunion workers did not leave the area or concede to union policies and principles." *Scott* v. *Moore*, 461 F. Supp. 224, 227 (ED Tex. 1978). The violence and vandalism delayed construction and led Cross to default on its contract with the Army.

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*Title 42 U. S. C. § 1985(3) (1976 ed., Supp. V), in its entirety, provides as follows:

"(3) Depriving persons of rights or privileges

"If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

The plaintiffs in this case, after amendment of the complaint, were respondents Scott and Matthews—two Cross employees who had been beaten—and the company itself. The Sabine Area Building and Trades Council, 25 local unions, and various individuals were named as defendants. Plaintiffs asserted that defendants had conspired to deprive plaintiffs of their legally protected rights, contrary to 42 U. S. C. § 1985(3) (1976 ed., Supp. V). The case was tried to the court. A permanent injunction was entered, and damages were awarded against 11 of the local unions, $5,000 each to the individual plaintiffs and $112,385.44 to Cross, plus attorney's fees in the amount of $25,000.

In arriving at its judgment, the District Court recognized that to make out a violation of § 1985(3), as construed in *Griffin* v. *Breckenridge*, 403 U. S. 88, 102–103 (1971), the plaintiff must allege and prove four elements: (1) a conspiracy;

(2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. The District Court found that the first, third, and fourth of these elements were plainly established. The issue, the District Court thought, concerned the second element, for in construing that requirement in *Griffin*, we held that the conspiracy not only must have as its purpose the deprivation of "equal protection of the laws, or of equal privileges and immunities under the laws," but also must be motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.*, at 102. *Griffin* having involved racial animus and interference with rights that Congress could unquestionably protect against private conspiracies, the issue the District Court identified was whether private conspiratorial discrimination against employees of a nonunionized entity is the kind of conduct that triggers the proscription of § 1985(3). The District Court concluded that the conspiracy encompassed violations of both the civil and criminal laws of the State of Texas, thus depriving plaintiff of the protections afforded by those laws, that § 1985(3) proscribes class-based animus other than racial bias, and that the class of nonunion laborers and employers is a protected class under the section. The District Court believed that "men and women have the right to associate or not to associate with any group or class of individuals, and concomitantly, to be free of violent acts against their bodies and property because of such association or non-association." 461 F. Supp., at 230. The conduct evidenced a discriminatory animus against nonunion workers; hence, there had been a violation of the federal law.

The Court of Appeals, sitting en banc, except for setting aside for failure of proof the judgment against 8 of the 11 local unions, affirmed the judgment of the District Court. *Scott* v. *Moore,* 680 F. 2d 979 (CA5 1982). The Court of Appeals understood respondents' submission to be that petitioners' conspiracy was aimed at depriving respondents of their First Amendment right to associate with their fellow nonunion employees and that this curtailment was a deprivation of the equal protection of the laws within the meaning of § 1985(3). The Court of Appeals agreed, for the most part, holding that the purpose of the conspiracy was to deprive plaintiffs of their First Amendment right not to associate with a union. The court rejected the argument that it was necessary to show some state involvement to demonstrate an infringement of First Amendment rights. This argument, it thought, had been expressly rejected in *Griffin,* and it therefore felt compelled to disagree with two decisions of the Court of Appeals for the Seventh Circuit espousing that position. *Murphy* v. *Mount Carmel High School,* 543 F. 2d 1189 (1976); *Dombrowski* v. *Dowling,* 459 F. 2d 190 (1972). The Court of Appeals went on to hold that § 1985(3) reached conspiracies motivated either by political or economic bias. Thus petitioners' conspiracy to harm the nonunion employees of a nonunionized contractor embodied the kind of class-based animus contemplated by § 1985(3) as construed in *Griffin.* Because of the importance of the issue involved, we granted certiorari, 459 U. S. 1034. We now reverse.

II

We do not disagree with the District Court and the Court of Appeals that there was a conspiracy, an act done in furtherance thereof, and a resultant injury to persons and property. Contrary to the Court of Appeals, however, we conclude that an alleged conspiracy to infringe First Amendment rights is not a violation of § 1985(3) unless it is proved that the State is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the State. We also disagree with the Court of Appeals' view that there was present here the kind of animus that § 1985(3) requires.

A

The Equal Protection Clause of the Fourteenth Amendment prohibits any State from denying any person the equal protection of the laws. The First Amendment, which by virtue of the Due Process Clause of the Fourteenth Amendment now applies to state governments and their officials, prohibits either Congress or a State from making any "law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble." Had § 1985(3) in so many words prohibited conspiracies to deprive any person of the equal protection of the laws guaranteed by the Fourteenth Amendment or of freedom of speech guaranteed by the First Amendment, it would be untenable to contend that either of those provisions could be violated by a conspiracy that did not somehow involve or affect a State.

> "It is a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority. The Equal Protection Clause 'does not . . . add any thing to the rights which one citizen has under the Constitution against another.' *United States* v. *Cruikshank*, 92 U. S. 542, 554–555. As Mr. JUSTICE DOUGLAS more recently put it, 'The Fourteenth Amendment protects the individual against *state action*, not against wrongs done by *individuals*.' *United States* v. *Williams*, 341 U. S. 70, 92 (dissenting opinion). This has been the view of the Court from the beginning. *United States* v. *Cruikshank*, *supra; United States* v. *Harris*, 106 U. S. 629; *Civil Rights Cases*, 109 U. S. 3; *Hodges* v. *United States*, 203 U. S. 1; *United States* v. *Powell*, 212 U. S. 564. It remains the Court's view today. See, *e. g.*, *Evans* v. *Newton*, 382 U. S. 296;

> *United States* v. *Price*, *post*, p. 787." *United States* v. *Guest*, 383 U. S. 745, 755 (1966).

The opinion for the Court by Justice Fortas in the companion case characterized the Fourteenth Amendment rights in the same way:

> "As we have consistently held 'The Fourteenth Amendment protects the individual against *state action*, not against wrongs done by *individuals*.' *Williams I*, 341 U. S., at 92 (opinion of Douglas, J.)" *United States* v. *Price*, 383 U. S. 787, 799 (1966).

In this respect, the Court of Appeals for the Seventh Circuit was thus correct in holding that a conspiracy to violate First Amendment rights is not made out without proof of state involvement. *Murphy* v. *Mount Carmel High School*, *supra*, at 1193.

Griffin v. *Breckenridge* is not to the contrary. There we held that § 1985(3) reaches purely private conspiracies and, as so interpreted, was not invalid on its face or as there applied. We recognized that the language of the section referring to deprivations of "equal protection" or of "equal privileges and immunities" resembled the language and prohibitions of the Fourteenth Amendment, and that if § 1985(3) was so understood, it would be difficult to conceive of a violation of the statute that did not involve the State in some respect. But we observed that the section does not expressly refer to the Fourteenth Amendment and that there is nothing "inherent" in the language used in § 1985(3) "that requires the action working the deprivation to come from the State." 403 U. S., at 97. This was a correct reading of the language of the Act; the section is not limited by the constraints of the Fourteenth Amendment. The broader scope of § 1985(3) became even more apparent when we explained that the conspiracy at issue was actionable because it was aimed at depriving the plaintiffs of rights protected by the Thirteenth Amendment and the right to travel guaranteed by the Federal Constitution. Section 1985(3) constitutionally can and does protect those rights from interference by purely private conspiracies.

Griffin did not hold that even when the alleged conspiracy is aimed at a right that is by definition a right only against state interference the plaintiff in a § 1985(3) suit nevertheless need not prove that the conspiracy contemplated state involvement of some sort. The complaint in *Griffin* alleged, among other things, a deprivation of First Amendment rights, but we did not sustain the action on the basis of that allegation and paid it scant attention. Instead, we upheld the application of § 1985(3) to private conspiracies aimed at interfering with rights constitutionally protected against private, as well as official, encroachment.

Neither is respondents' position helped by the assertion that even if the Fourteenth Amendment does not provide authority to proscribe exclusively private conspiracies, precisely the same conduct could be proscribed by the Commerce Clause. That is no doubt the case; but § 1985(3) is not such a provision, since it "provides no substantive rights itself" to the class conspired against. *Great American Federal Savings & Loan Assn.* v. *Novotny*, 442 U. S. 366, 372 (1979). The rights, privileges, and immunities that § 1985(3) vindicates must be found elsewhere, and here the right claimed to have been infringed has its source in the First Amendment. Because that Amendment restrains only official conduct, to make out their § 1985(3) case, it was necessary for respondents to prove that the State was somehow involved in or affected by the conspiracy.

The Court of Appeals accordingly erred in holding that § 1985(3) prohibits wholly private conspiracies to abridge the right of association guaranteed by the First Amendment. Because of that holding the Court of Appeals found it unnecessary to determine whether respondents' action could be sustained under § 1985(3) as involving a conspiracy to deprive respondents of rights, privileges, or immunites under state law or those protected against private action by the Federal Constitution or federal statutory law. Conceivably, we could remand for consideration of these possibilities, or we ourselves could consider them. We take neither course, for in our view the Court of Appeals should also be reversed on the dispositive ground that § 1985(3)'s requirement that there must be "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action," *Griffin* v. *Breckenridge*, 403 U. S., at 102, was not satisfied in this case.

B

As indicated above, after examining the language, structure, and legislative history of § 1985(3), the *Griffin* opinion emphatically declared that the section was intended to reach private conspiracies that in no way involved the State. The Court was nevertheless aware that the sweep of § 1985 as originally introduced in the House provoked strong opposition in that chamber and precipitated the proposal and adoption of a narrowing amendment, which limited the breadth of the bill so that the bill did not provide a federal remedy for "all tortious, conspiratorial interferences with the rights of others." 403 U. S., at 101. In large part, opposition to the original bill had been motivated by a belief that Congress lacked the authority to punish every assault and battery committed by two or more persons. *Id.*, at 102; Cong. Globe, 42d Cong., 1st Sess., App. 68, 115, 153, 188, 315 (1871); *id.*, at 485–486, 514. As we interpreted the legislative history 12 years ago in *Griffin*, the narrowing amendment "centered entirely on the animus or motivation that would be required . . . ." 403 U. S., at 100. Thus:

> "The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amend-

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> ment. See the remarks of Representatives Willard and Shellabarger, quoted *supra*, at 100. The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." *Id.*, at 102 (footnotes omitted).

This conclusion was warranted by the legislative history, was reaffirmed in *Novotny*, *supra*, and we accept it as the authoritative construction of the statute.

Because the facts in *Griffin* revealed an animus against Negroes and those who supported them, a class-based, invidious discrimination which was the central concern of Congress in enacting § 1985(3), the Court expressly declined to decide "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us." 403 U. S., at 102, n. 9. Both courts below answered that question; both held that the section not only reaches conspiracies other than those motivated by racial bias but also forbids conspiracies against workers who refuse to join a union. We disagree with the latter conclusion and do not affirm the former.

C

The Court of Appeals arrived at its result by first describing the Reconstruction-era Ku Klux Klan as a political organization that sought to deprive a large segment of the Southern population of political power and participation in the governance of those States and of the Nation. The Court of Appeals then reasoned that because Republicans were among the objects of the Klan's conspiratorial activities, Republicans in particular and political groups in general were to be protected by § 1985(3). Finally, because it believed that an animus against an economic group such as those who preferred nonunion association is "closely akin" to the animus against political association, the Court of Appeals concluded that the animus against nonunion employees in the Port Arthur area was sufficiently similar to the animus against a political party to satisfy the requirements of § 1985(3).

We are unpersuaded. In the first place, it is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans. The central theme of the bill's proponents was that the Klan and others were forcibly resisting efforts to emancipate Negroes and give them equal access to political power. The predominant purpose of § 1985(3) was to combat the prevalent animus against Negroes and their supporters. The latter included Republicans generally, as well as others, such as Northerners who came South with sympathetic views towards the Negro. Although we have examined with some care the legislative history that has been marshaled in support of the position that Congress meant to forbid wholly nonracial, but politically motivated conspiracies, we find difficult the question whether § 1985(3) provided a remedy for every concerted effort by one political group to nullify the influence of or do other injury to a competing group by use of otherwise unlawful means. To accede to that view would go far toward making the federal courts, by virtue of § 1985(3), the monitors of campaign tactics in both state and federal elections, a role that the courts should not be quick to assume. If respondents' submission were accepted, the proscription of § 1985(3) would arguably reach the claim that a political party has interfered with the freedom of speech of another political party by encouraging the heckling of its rival's speakers and the disruption of the rival's meetings.

We realize that there is some legislative history to support the view that § 1985(3) has a broader reach. Senator Edmunds' statement on the floor of the Senate is the clearest expression of this view. He said that if a conspiracy were formed against a man "because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, . . . then this section could reach it." Cong. Globe, 42d Cong., 1st Sess., 567 (1871). The provision that is now § 1985(3), however, originated in the House. The narrowing amendment, which changed § 1985(3) to its present form, was proposed, debated, and adopted there, and the Senate made only technical changes to the bill. Senator Edmunds' views, since he managed the bill on the floor of the Senate, are not without weight. But we were aware of his views in *Griffin*, 403 U. S., at 102, n. 9, and still withheld judgment on the question whether § 1985(3), as enacted, went any farther than its central concern—combating the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, Fourteenth, and Fifteenth Amendments. Lacking other evidence of congressional intention, we follow the same course here.

D

Even if the section must be construed to reach conspiracies aimed at any class or organization on account of its political views or activities, or at any of the classes posited by Senator Edmunds, we find no convincing support in the legislative history for the proposition that the provision was intended to reach conspiracies motivated by bias towards others on account of their *economic* views, status, or activities. Such a construction would extend § 1985(3) into the economic life of the country in a way that we doubt that the 1871 Congress would have intended when it passed the provision in 1871.

Respondents submit that Congress intended to protect two general classes of Republicans, Negroes and Northern immigrants, the latter because the Klan resented carpetbagger efforts to dominate the economic life of the South. Respondents rely on a series of statements made during the debates on the Civil Rights Act of 1871, of which § 1985 was a part, indicating that Northern laborers and businessmen who had come from the North had been the targets of Klan conspiracies. Brief for Respondents 42–44. As we understand these remarks, however, the speakers believed that these Northerners were viewed as suspect because they were Republicans and were thought to be sympathetic to Negroes. We do not interpret these parts of the debates as asserting that the Klan had a general animus against either labor or capital, or against persons from other States as such. Nor is it plausible that the Southern Democrats were prejudiced generally against enterprising persons trying to better themselves, even if those enterprising persons were from Northern States. The animus was against Negroes and their sympathizers, and perhaps against Republicans as a class, but not against economic groups as such. Senator Pool, on whose remarks respondents rely, identified what he thought was the heart of the matter:

> "The truth is that whenever a northern man, who goes into a southern State, will prove a traitor to the principles which he entertained at home, when he will lend himself to the purposes of the Democracy or be purchased by them, they forget that he is a carpet-bagger and are ready to use him and elevate him to any office within their gift." Cong Globe, 42nd Cong., 1st. Sess., 607 (1871).

We thus cannot construe § 1985(3) to reach conspiracies motivated by economic or commercial animus. Were it otherwise, for example, § 1985(3) could be brought to bear on any act of violence resulting from union efforts to organize an employer or from the employer's efforts to resist it, so long as the victim merely asserted and proved that the conduct involved a conspiracy motivated by an animus in favor of unionization, or against it, as the case may be. The National Labor Relations Act, 29 U. S. C. § 151 *et seq.* (1976 ed. and Supp. V), addresses in great detail the relationship between employer, employee, and union in a great variety of situations, and it would be an unsettling event to rule that strike and picket-line violence must now be considered in the light of the strictures of § 1985(3). Moreover, if antiunion, antinonunion, or antiemployer biases represent the kinds of animus that trigger § 1985(3), there would be little basis for concluding that the statute did not provide a cause of action in a variety of other situations where one economic group is pitted against another, each having the intent of injuring or destroying the economic health of the other. We think that such a construction of the statute, which is at best only arguable and surely not compelled by either its language or legislative history, should be eschewed and that group actions generally resting on economic motivations should be deemed beyond the reach of § 1985(3). Economic and commercial conflicts, we think, are best dealt with by statutes, federal or state, specifically addressed to such problems, as well as by the general law proscribing injuries to persons and property. If we have misconstrued the intent of the 1871 Congress, or, in any event, if Congress now prefers to take a different tack, the Court will, of course, enforce any statute within the power of Congress to enact.

Accordingly, the judgment of the Court of Appeals is

Reversed.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE O'CONNOR join, dissenting.

The Ku Klux Klan Act was the Reconstruction Congress' response to politically motivated mob violence in the postbellum South designed to intimidate persons in the exercise of their legal rights. While § 1 of the Act prohibits state officials from violating the federal rights of citizens, § 2 addresses the problem of mob violence directly.[1] It provides criminal and civil liability for private conspiracies to deprive "either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws." Act of Apr. 20, 1871, §2, 17 Stat. 13 (current version at 42 U. S. C. §1985(3) (1976 ed., Supp. V)). Today, in a classic case of mob violence intended to intimidate persons from exercising their legal rights, the Court holds that the Ku Klux Klan Act provides no protection.

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[1] Section 1 of the Act is now codified as 42 U. S. C. § 1983 (1976 ed., Supp. V). Section 2, in addition to the prohibition at issue here (now codified in § 1985(3), first clause), prohibits conspiracies to interfere with the performance of duties by federal officers (§ 1985(1)), with the administra-

I

The Court first holds that §1985(3) prohibits a private conspiracy to interfere with the exercise of First Amendment rights only if some state action is involved.[2] *Ante*, at 830–834. The Court assumes that §1985(3) merely bans private conspiracies to accomplish deprivations that are actionable under §1983 when caused by state officials. Although Congress could have passed such a statute, the simple fact is that it did not.

A

On its face, §1985(3) differs structurally from §1983. *Briscoe* v. *LaHue*, 460 U. S. 325, 336–337 (1983); *id.*, at 356 (MARSHALL, J., dissenting); *Griffin* v. *Breckenridge*, 403 U. S. 88, 99 (1971). Unlike §1983, §1985(3) does not provide a cause of action for the deprivation of independent rights "secured by the Constitution and laws." Instead, it prohibits private conspiracies intended to prevent persons or classes of persons from the equal exercise of any of their

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tion of federal courts (§1985(2), first part), with the administration of state courts, (§1985(2), second part), with the duties of a state officer (§1985(3), second clause), and with the right to support candidates in a federal election (§1985(3), third clause). See *Kush* v. *Rutledge*, 460 U. S. 719, 724 (1983). See generally *Briscoe* v. *LaHue*, 460 U. S. 325, 336, n. 17 (1983) (describing §§3–6).

[2] The Court does not require that the conspirators be state officials or act under color of state law. Instead, the requirement is that the conspiracy intend to cause the State or a person acting under color of state law to deprive the victims of the conspiracy of their constitutional rights.

civil rights. No violation of an independent legal right is required; nor does § 1985(3) require state action or the involvement of the State in any other way.

The legislative history unambiguously establishes the meaning and function of the "equal protection" and "equal privileges and immunities" language in § 1985(3).[3] As originally introduced by Representative Shellabarger, § 2 did not contain these terms. Instead, it imposed federal criminal liability on private conspiracies to commit certain enumerated actions that would be federal crimes if committed in an enclave subject to United States jurisdiction.[4] In support of his bill, the Congressman argued that Congress had constitutional authority to legislate against private action in order to protect and secure the rights of national citizenship. Referring to Justice Washington's statement of national privileges and immunities in *Corfield* v. *Coryell*, 6 F. Cas. 546 (No. 3,230) (CCED Pa. 1825), Shellabarger stated that § 2 "punishes, not individual crime, but only banded, mastering, confederated violence. Then also it must be directed against the rights, privileges, or immunities of a citizen." Cong. Globe, 42d Cong., 1st Sess., App. 69 (Mar. 28, 1871).

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[3] The Court's misinterpretation of the language of the statute is compounded by the Court's subtle confusion of statutory construction with constitutional interpretation. As *Griffin* v. *Breckenridge*, 403 U. S. 88, 104 (1971), established and the Court seemingly recognizes, see *ante*, at 832–833, the two questions are separate. Determining the scope of § 1985(3) is a matter of statutory construction and has nothing to do with current interpretations of the First or Fourteenth Amendments. The 42d Congress' view of its constitutional authority in 1871 to reach private conduct under the Fourteenth Amendment is relevant in interpreting the reach of § 1985(3).

[4] The original version of § 2 provided:

"That if two or more persons shall, within the limits of any State, band or conspire together to do any act in violation of the rights, privileges, or immunities of another person, which, being committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny; and if one or more of the parties to said conspiracy shall do any act to effect the object thereof, all the parties to or engaged in said conspiracy, whether principals or accessories *[sic]*, shall be deemed guilty of a felony, and, upon conviction thereof, shall be liable, &c., and the crime shall be punishable as such in the courts of the United States." Cong. Globe, 42d Cong., 1st Sess., App. 68–69 (Mar. 28, 1871) (statement of Rep. Shellabarger), quoting H. R. 320, § 2, 42d Cong., 1st Sess. (1871).

In the debate that followed, radical Republicans supported the bill on a broader ground. They asserted that the Fourteenth Amendment had altered the balance between the States and the National Government so that Congress now was permitted to protect life, liberty, and property by legislating directly against criminal activity.[5] From the beginning of the debate, Democratic and other opponents of the bill saw the radical imprimatur on § 2 and argued that it exceeded congressional authority by extending federal jurisdiction to cover common crimes.[6] Republicans of more moderate persuasion also refused to support § 2 as proposed, fearing that it reflected the radical view.

Unlike the Democrats, however, the moderate Republicans agreed with Shellabarger that Congress had authority to reach private conduct by virtue of its power to protect the rights of national citizenship. They believed that Fourteenth Amendment rights were possessed by persons regardless of the presence of state action. See Cong. Globe, 42d Cong., 1st Sess., App. 153 (Apr. 4, 1871) (remarks of Rep. Garfield); *id.*, at 486 (Apr. 5, 1871) (remarks of Rep. Cook); *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 673 (1978). The dispute within the Republican majority centered on whether the bill itself was limited to this purpose, or instead whether it did or should usurp state authority over local and individual crimes.

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[5] See, *e. g.*, Cong. Globe, 42d Cong., 1st Sess., App. 73 (Mar. 30, 1871) (remarks of Rep. A. Blair); *id.*, at App. 85 (Mar. 31, 1871) (remarks of Rep. Bingham); *id.*, at App. 141 (Apr. 3, 1871) (remarks of Rep. Shanks).

[6] See, *e. g.*, *id.*, at 337 (Mar. 29, 1871) (remarks of Rep. Whitthorne); *id.*, at 361 (Mar. 31, 1871) (remarks of Rep. Swan); *id.*, at 366 (Mar. 31, 1871) (remarks of Rep. Arthur); *id.*, at 373 (Mar. 31, 1871) (remarks of Rep. Archer).

Although individual views among the moderates differed,[7] the extensive remarks of Representative Garfield summarized their position well. See R. Harris, The Quest for Equality 47 (1960). Garfield did not believe that Congress had the power to displace the criminal jurisdiction of the States. In his view, however, the Fourteenth Amendment provided citizens with an affirmative and congressionally enforceable right to equal protection of the laws: "the provision that the States shall not 'deny the equal protection of the laws' implies that they shall afford equal protection." Cong. Globe, 42d Cong., 1st Sess., App. 153 (Apr. 4, 1871). When the States neglect or refuse to provide equal protection, "it is undoubtedly within the power of Congress to provide by law for the punishment of all persons, official or private, who shall invade these rights [guaranteed by the Civil War Amendments], and who by violence, threats, or intimidation shall deprive any citizen of their fullest enjoyment." *Ibid.*

Garfield's theory of the Fourteenth Amendment was that the right of equal protection of the laws as well as other rights were rights of national citizenship guaranteed directly to the people. They existed independently of any state action. He disagreed with the radicals about the circumstances under which Congress could step in to protect those rights. He stated:

> "[T]he chief complaint is not that the laws of the State are unequal, but that even where the laws are just and

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[7] Representative Farnsworth, for example, took the more conservative view that Congress could not punish individuals under the Equal Protection Clause, but could only prohibit unequal state legislation. *Id.*, at 115 (Mar. 31, 1871). He ultimately voted for the Act. *Id.*, at 522 (Apr. 6, 1871). Other Republicans held the belief that Congress could punish individuals only when their conspiracy intended to obstruct a state official's duty to provide equal protection of the laws. See Comment, A Construction of Section 1985(c) in Light of Its Original Purpose, 46 U. Chi. L. Rev. 402, 414–415 (1979). The bill as passed, however, was not limited by either type of restriction.

> equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe the last clause of the first section [of the Fourteenth Amendment] empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection." *Ibid.*

Garfield concluded by stating that he could support the bill if § 2 was amended to reflect this view. *Ibid.*

Because the moderates held the balance of power, see Comment, A Construction of Section 1985(c) in Light of Its Original Purpose, 46 U. Chi. L. Rev. 402, 412, n. 47 (1979), some amendment was necessary. The day after Garfield's speech, Shellabarger introduced a new § 2. Cong. Globe, 42d Cong., 1st Sess., 477 (Apr. 5, 1871). The amendment removed the list of actionable crimes and added a civil cause of action for persons injured by the conspiracy. It also added the critical language that imposed liability on persons who "conspire together for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws."[8] *Ibid.* According to Shellabarger:

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[8] Immediately following this clause in the amendment were two other proposed clauses using similar equal protection language. The first prohibited a conspiracy "for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws." Cong. Globe, 42d Cong., 1st Sess., 477 (Apr. 5, 1871). This clause is now codified at 42 U. S. C. § 1985(3), second clause, see n. 1, *supra*, and clearly requires some state involvement.

The second clause prohibited a conspiracy "to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws." Cong. Globe, 42d Cong., 1st Sess., 477 (Apr. 5, 1871). An amendment in the Senate added to this last clause the prohibition of a conspiracy "for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the

> "The object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights shall be within the scope of the remedies of this section." *Id.*, at 478.

Representative Willard—who opposed the original version and claimed to have drafted the amendment—stated that

> "the essence of the crime should consist in the intent to deprive a person of the equal protection of the laws and of equal privileges and immunities under the laws; in other words, that the Constitution secured, and was only intended to secure, equality of rights and immunities, and that we could only punish by United States laws a denial of that equality." *Id.*, at App. 188 (Apr. 6, 1871).

Although these are the only two statements that bear directly on the clause at issue, other Representatives generally approved of the amendment because it avoided the evil of imposing a federal criminal law on the States.[9] As

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United States the due and equal protection of the laws." *Id.*, at 702 (Apr. 14, 1871). This clause as amended is now codified in the second part of § 1985(2).

[9] For example, Representative Cook, who had opposed the original version and who had introduced similar amendments, see *id.*, at 478 (Apr. 5, 1871) (remarks of Rep. Shellabarger), stated that the amendment did not provide for federal punishment of "an assault and battery when committed by two or more persons within a State." *Id.*, at 485 (Apr. 5, 1871).

"The proposition we maintain is that wherever the Constitution of the United States secures a right to a citizen Congress may enforce and protect that right. One absolute test is this: Congress may legislate to protect any right the denial of which by a State court would give the citizen affected thereby a right to appeal to the Supreme Court of the United States for redress. . . . I do not care what that right is, so it is a right which is secured by the Constitution of the United States, either by an affirmative or a negative provision. Whether a right secured by the Constitution touches amended, this bill was adopted by the House on April 6. *Id.*, at 522.

The Senate considered the House bill for only three days, and with a few limited changes, adopted it on April 14. *Id.*, at 709. In explaining the scope of § 2, Senator Edmunds expressed the view that it included conspiracies to "overthrow the Government, conspiracies to impede the course of justice, conspiracies to deprive people of the equal protection of the laws, whatever those laws may be." *Id.*, at 568 (Apr. 11, 1871). Senator Pool expressed his support by remarking that the Fourteenth Amendment had conferred a new right on every citizen—the right to protection of the laws. *Id.*, at 608 (Apr. 12, 1871).

Throughout the debates on § 2, the Republican majority agreed that the Fourteenth Amendment conferred rights, including the right to equal protection of the laws, directly on persons and that those rights could be violated by private conspirators. The debate was over the conditions under which the Federal Government could step in to assert jurisdiction to protect those rights—a separate constitutional

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the person of a citizen, that right may be protected by the national laws." *Ibid.*

However, Representative Burchard, who shared with Farnsworth a more limited view of congressional authority under the Fourteenth Amendment, see n. 7, *supra*, stated in general terms that "[t]he gravamen of the offense is the unlawful attempt to prevent a State through its officers enforcing in behalf of a citizen of the United States his constitutional right to equality of protection." Cong. Globe, 42d Cong., 1st Sess., App. 315 (Apr. 6, 1871). Shortly thereafter, Representative Farnsworth restated his view, see n. 7, *supra*, and attempted to amend the clause immediately following the one at issue to limit its scope to federal officers. Cong. Globe, 42d Cong., 1st Sess., 513 (Apr. 6, 1871). After a lengthy colloquy with Representative Poland, *id.*, at 512–514, Farnsworth dropped his amendment. *Id.*, at 515. In any event, Burchard agreed with Cook that the "amendment obviates in a great measure the objections and the doubtful construction as to the extent of jurisdiction for the punishment of crimes intended by the bill. It is not denial of protection, but of equality of protection, which constitutes the offense against the United States." *Id.*, at App. 315 (Apr. 6, 1871).

question of federal-state comity—not over the nature of the rights themselves. By limiting § 2 to deprivations of equal protection and of equal privileges and immunities, the 42d Congress avoided the constitutional problems the more moderate Republicans saw in the creation of a general federal criminal law. The effect of that language was to limit federal jurisdiction to cases in which persons were the victims of private conspiracies motivated by the intent to interfere in the equal exercise and enjoyment of their legal rights.[10] Congress did not intend any requirement of state involvement in either a civil or criminal action under § 2.

B

Consistent with this view, the Court has held on several occasions that § 2 reaches purely private conspiracies. In *United States* v. *Harris*, 106 U. S. 629 (1883), the Court construed § 2 to prohibit a private conspiracy to deprive certain persons of equal protection by removing them from jail by force and lynching them. Section 2, it stated, applies "no matter how well the State may have performed its duty. Under it private persons are liable to punishment for conspiring to deprive any one of the equal protection of the laws enacted by the State."[11] *Id.*, at 639; cf. *United States* v. *Williams*, 341 U. S. 70, 76 (1951) (plurality opinion) (similar conspiracy provision, 18 U. S. C. § 241, reaches private action).

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[10] The Court in *Great American Federal Savings & Loan Assn.* v. *Novotny*, 442 U. S. 366, 372, 376 (1979), stated that § 1985(3) is a remedial statute and provides no substantive rights. The 42d Congress also believed it was providing a remedy, see Cong. Globe, 42d Cong., 1st Sess., App. 68 (Mar. 28, 1871) (remarks of Rep. Shellabarger)—a remedy for violations of the right to equal protection which it believed was guaranteed against both state and private action. To the extent that the language of § 2 incorporated that interpretation of the scope of the right, it is not strictly remedial from the current perspective on constitutional law. Moreover, like other conspiracy statutes, § 1985(3) "is best viewed as a unique provision for which a remedial versus substantive characterization is misplaced." Note, Private Conspiracies to Violate Civil Rights: The Scope of Section 1985(3) After *Great American Federal Savings & Loan Association* v. *Novotny*, 61 B. U. L. Rev. 1007, 1021 (1981). The *Novotny* Court's statements were accurate, if unnecessary, in the context of the issue in that case, but should not be given independent significance. The Court, however, employs them in summary fashion to dispose of the statutory construction question without real analysis of the issue. *Ante*, at 833.

Collins v. *Hardyman*, 341 U. S. 651 (1951), arose from a political brawl between two white groups. The complaint alleged a § 1985(3) conspiracy to hinder the plaintiffs' equal enjoyment of their First Amendment rights. *Id.*, at 653–654. The Court noted possible constitutional problems with imposing civil liability for this type of activity, *id.*, at 659, but passed over the issue. *Id.*, at 661. Instead, it found that the alleged conspiracy was not one prohibited by the statute because there was no "allegation that defendants were conscious of or trying to influence the law." *Ibid.* The *Collins* decision thus suggested a requirement of state involvement virtually identical to that adopted by the Court today.

Griffin v. *Breckenridge*, 403 U. S. 88 (1971), however, put this suggested requirement to rest. In a unanimous decision, the Court stated that the evolution of the law had washed away the constitutional concerns of *Collins*, and that there was no reason "not to accord to the words of the statute their apparent meaning."[12] 403 U. S., at 96. The Court expressly rejected a requirement of state involvement in the form of an intent to interfere with state officials.[13] *Id.*, at 99; see Comment, Private Conspiracies to Violate Civil Rights: *McLellan* v. *Mississippi Power & Light Co.*, 90 Harv. L. Rev. 1721, 1730 (1977) (state involvement requirement is incompatible with *Griffin*). It then reviewed the legislative history to find that the only statutory limitation on the broad sweep of § 1985(3) was a requirement of "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." 403 U. S., at 102; see *id.*, at 99–102.

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[11] Although the indictment was valid under the statute, 106 U. S., at 639, the Court found no constitutional authorization for the criminal prohibition of § 2 under the Fourteenth Amendment, *id.*, at 638–640, citing *United States* v. *Cruikshank*, 92 U. S. 542 (1876), under the Thirteenth and Fifteenth Amendments, 106 U. S., at 637, 640–643, or under Art. 4, § 2, *id.*, at 643.

[12] As the Court notes, *ante*, at 832, the *Griffin* court stated:

"A century of Fourteenth Amendment adjudication has . . . made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons. Yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State." 403 U. S., at 97.

This implicitly recognizes that the Members of the 42d Congress believed that the right to equal protection of the laws could be violated by private action.

As *Griffin* held, the "equal protection of the laws" and the "equal privileges and immunities" language in § 1985(3) was intended by the 42d Congress to prevent the statute from creating a general federal criminal or tort law. It was not intended to impose a state-action or state-involvement requirement on actions under the statute. Properly interpreted, § 1985(3) prohibits private conspiracies designed to interfere with persons' equal enjoyment and exercise of their civil rights even if those conspiracies have no state involvement of any kind.[14]

II

As *Griffin* recognized, the words "equal protection of the laws" and "equal privileges and immunities" limit the types of actionable private conspiracies to those involving class-based animus. As an initial matter, the intended victims must be victims not because of any personal malice the conspirators have toward them, but because of their membership in or affiliation with a particular class. Cong. Globe, 42d Cong., 1st Sess., 702 (Apr. 14, 1871) (remarks of Sen. Edmunds); see *id.*, at 567 (Apr. 11, 1871) (remarks of Sen. Edmunds). Moreover, the class must exist independently of the defendants' actions; that is, it cannot be defined simply as the group of victims of the tortious action. See *Askew* v. *Bloemker*, 548 F. 2d 673, 678 (CA7 1976); *Lopez* v. *Arrowhead Ranches*, 523 F. 2d 924, 928 (CA9 1975).

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[13] This form of state action is covered by the second clause of § 1985(3), which imposes liability for hindering a state officer in providing equal protection. 403 U. S., at 99; see nn. 1 and 10, *supra*. The Court today asserts that *Griffin* rejected a general requirement that the conspiracy itself involve state action, but did not reject specifically the requirement of state involvement when the constitutional right implicated is one against state action. See n. 2, *supra*. The Court, however, simply ignores the fact that we also rejected the latter type of requirement as a matter of statutory construction, see 403 U. S., at 99, and arrives at a contradictory construction by imposing the constitutional interpretation of the First and Fourteenth Amendments on the statute. See n. 3, *supra*.

[14] The Constitution poses no obstacle to this exercise of congressional power. The Court correctly recognizes that Congress has the power under the Commerce Clause to ban such conspiracies. *Ante*, at 833; see *Katzenbach* v. *McClung*, 379 U. S. 294, 304 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 257–258 (1964).

A

Aside from this initial rule of exclusion, however, the types of classes covered by the statute are far from clear. The statutory language is broad and could include a wide variety of class-based denials of equal protection and equal enjoyment of rights; yet it is also indefinite, and in *Griffin*, the Court reserved the question whether nonracial classes are covered. 403 U. S., at 102. The legislative history provides little assistance, probably because the congressional majority had little disagreement on the need to halt conspirational Klan violence and was far more concerned with its constitutional authority to criminalize such conspiracies.

The general statements of the Act's purpose give some indication of the breadth of the remedy Congress provided. Contrary to the Court's suggestion, *ante*, at 835–837, the 42d Congress viewed the Ku Klux Klan as pre-eminently a political organization, whose violence was thought to be premised most often on the political viewpoints of its victims.[15] "They murder men in their own houses for a difference in political opinions and defy the laws which denounce these acts." Cong. Globe, 42d Cong., 1st Sess., App. 72 (Mar. 30, 1871) (remarks of Rep. Blair); see *id.*, at 391 (Apr. 1, 1871) (remarks of Rep. Elliott). Moreover, as the legislative history surveyed above reveals, Congress recognized that this violence could fester because the general opposition to Reconstruction policies in the South rendered local law enforcement authorities less likely to protect the rights of persons affiliated in any way with those policies.

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[15] The Klan's goal was to overthrow Republican Reconstruction policies both by terrorizing local supporters of those policies in order to place sympathetic Democrats in office, and when that failed by supplanting the authority of local officials directly with mob violence. See Comment, 46

In my view, Congress intended to provide a federal remedy for all *classes* that seek to exercise their legal rights in unprotected circumstances similar to those of the victims of Klan violence. Instead of contemplating a list of actionable class traits, though, Congress had in mind a functional definition of the scope of § 2. As Representative Garfield stated in the debates, the chief danger was "a systematic maladministration of [the laws], or a neglect or refusal to enforce their provisions." *Id.*, at App. 153 (Apr. 4, 1871). Congress did not require that a § 2 plaintiff allege a neglect on the part of state officers to enforce the laws equally. Instead, it took the view that whenever a conspiracy involved invidious animus toward a class of persons, the possibility of ineffective state enforcement was sufficient to support federal intervention.[16] *Id.*, at 485 (Apr. 5, 1871) (remarks of Rep. Cook).

U. Chi. L. Rev., at 408–410. Although Negroes frequently were the objects of this terrorism, they were simply one symbol of the hated Reconstruction policies. According to Senator Pool, "[t]he real question is whether the reconstruction policy of Congress, which was adopted after the close of war and announced as necessary to the future peace and security of this nation, shall be carried into practical effect, or whether it shall practically be nullified by local violence." Cong. Globe, 42d Cong., 1st Sess., App. 101 (Mar. 31, 1871); see *id.*, at 333 (Mar. 29, 1871) (remarks of Rep. Hoar); *id.*, at 390–391 (Apr. 1, 1871) (remarks of Rep. Elliot); *id.*, at App. 252–253 (Apr. 4, 1871) (remarks of Sen. Morton).

[16] That vulnerability is a factor is indicated by Representative Roberts' description of the distribution of mob violence: "Take the political census of

B

This view of the scope of § 2 is corroborated by congressional statements of concern for another group subject to Klan violence: economic migrants. While the Klan's victims usually were Republicans, Congress extended protection to this group because of its tenuous position in the South. Reconstruction, although mainly a political program, see J. Randall & D. Donald, The Civil War and Reconstruction 592–600 (2d ed. 1961), also was an attempt to reorganize the economic life of the region. W. Du Bois, Black Reconstruction in America 345–353 (1962). Particularly irritating to the poorer Southerners who supported the Ku Klux Klan was the new competition in the labor market from Negroes. *Id.*, at 19; Randall & Donald, *supra*, at 684. Moreover, carpetbaggers from the North moved into the South to seek their fortunes as well as to make new lives. C. Woodward, Reunion and Reaction 52–57 (1966).

Many of the Democratic opponents of the Act saw the Act's protection of Negroes and carpetbaggers as just another facet of the Reconstruction policies of economic exploitation.[17] Republican supporters of the bill also recognized the economic features of Reconstruction. They, however, saw the Klan terrorism as directed at the legitimate economic activities of those who migrated to the South to better them-

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the States lately in rebellion by districts. Mark those which are strongly Republican and those which are decidedly Democratic. In neither of them will you find systematic assaults upon citizens. The districts which are politically doubtful are scarlet with human gore." *Id.*, at 413 (Apr. 3, 1871); see *id.*, at 607 (Apr. 12, 1871) (remarks of Sen. Pool). Senator Edmunds' frequently quoted remark about Democrats, Vermonters, Catholics, and Methodists, *id.*, at 567 (Apr. 11, 1871), quoted *ante*, at 837, indicates classes that in particular circumstances or in geographic regions might qualify for protection because of their vulnerability.

[17] Representative Swan viewed Reconstruction simply as opening the South to economic exploitation by Northerners under the pretext of aiding Negroes. Cong. Globe, 42d Cong., 1st Sess., 362 (Mar. 31, 1871); see *id.*, at 354 (Mar. 30, 1871) (remarks of Rep. Beck).

selves.[18] Representative Kelley was the most explicit: he interpreted the Klan problem as essentially one of Southern resistance to economic migrations of Northerners. *Id.*, at 338–339, 341 (Mar. 29, 1871).[19]

C

The 42d Congress was concerned about these economic migrants because of their vulnerability as symbols and effects of Reconstruction policies. Congress' answer to the problem of Klan violence—a problem with political, racial, and economic overtones—was to create a general federal remedy to protect classes of people from private conspiracies aimed at interfering with the class members' equal exercise of their civil rights. The critical consideration is the 42d Congress' perception that the atrocities perpetrated by the Klan were injuring persons who, largely because of their political affiliation, were unable to demand protection from local law enforcement officials. Congress intended to provide a remedy to any class of persons, whose beliefs or associations placed them in danger of not receiving equal protection of the laws from local authorities. While certain class traits, such as race, religion, sex, and national origin, *per se* meet this requirement, other traits also may implicate the functional concerns in particular situations.

III

In the circumstances of this case, respondents are protected by § 2 and fall within this definition. Port Arthur,

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[18] See *id.*, at 368 (Mar. 31, 1871) (remarks of Sen. Sheldon) (right of persons to migrate and engage in legitimate traffic); *id.*, at 414 (Apr. 1, 1871) (remarks of Rep. Roberts) ("The carpet-bag is a sign of the vitality of our people"); *id.*, at 500 (Apr. 6, 1871) (remarks of Sen. Frelinghuysen) (Constitution protects migration of workers).

[19] See *id.*, at 653 (Apr. 13, 1871) (remarks of Sen. Osborn) (violence harms men who have migrated to the South for economic reasons). Senator Morton echoed this theme, stating that the purpose of Klan violence was to drive out Republicans; this effectively barred Northern capital and immigration. *Id.*, at App. 252 (Apr. 4, 1871).

Tex., was a self-professed union town. Respondents were threatened because of petitioners' view that nonunion workers were encroaching into an area that petitioners desired to keep union dominated. The identity or individuality of each of the victims was irrelevant to the conspiracy; the victims were attacked because of their pre-existing nonunion association. The conspiracy was similar to the Klan conspiracies Congress desired to punish in enacting §2. In this union town, the effectiveness of local law enforcement protection for nonunion workers was open to question.[20] Petitioners intended to hinder a particular group in the exercise of their legal rights because of their membership in a specific class.

IV

In *Griffin* v. *Breckenridge*, we reaffirmed our general approach to Reconstruction civil rights statutes including § 1985(3). Those statutes are to be given "'a sweep as broad as [their] language.'" 403 U. S., at 97, quoting *United States* v. *Price*, 383 U. S. 787, 801 (1966). In the 12 years since *Griffin*, that principle has not lost its vitality. I see no basis for the Court's crabbed and uninformed reading of the words of § 1985(3). I dissent.

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[20] Although it is not necessary to plead ineffectiveness of local law enforcement in order to maintain a § 1985(3) action, some victims of the Port Arthur incident experienced difficulty in obtaining an injunction from a state court against future episodes of violence. See Tr. of Oral Arg. 33.

AMERICAN BANK & TRUST CO. ET AL. *v.* DALLAS COUNTY ET AL.

CERTIORARI TO THE COURT OF APPEALS OF TEXAS, FIFTH SUPREME JUDICIAL DISTRICT

No. 81-1717. Argued March 29, 1983—Decided July 5, 1983*

Until 1959, Rev. Stat. § 3701 provided in pertinent part that "[a]ll stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority." In 1959, Congress amended § 3701 by adding a second sentence: "This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax," with exceptions only for nondiscriminatory franchise taxes or other nonproperty taxes, and for estate or inheritance taxes. In 1979 and 1980, Texas imposed a property tax on bank shares, and the tax was levied on bank shares of petitioner state and national banks and their shareholders. The tax was computed on the basis of each bank's net assets without any deduction for the value of United States obligations held by the bank. Petitioners, in separate state-court actions, sought mandamus, declaratory, and injunctive relief, asserting that § 3701, as amended, required that the value of their bank shares be reduced by the proportionate value of the United States obligations held by the bank. Ultimately, the Texas Court of Civil Appeals, in companion cases, upheld the tax.

Held:

1. The Texas tax on bank shares violates Rev. Stat. § 3701, as amended. Pp. 862–867.

(a) The 1959 amendment to § 3701 set aside this Court's pre-1959 interpretation that the statute did not prohibit nondiscriminatory taxes imposed on discrete property interests such as corporate shares, even though the value of that discrete interest was measured by the underlying assets, including United States obligations. Under the plain language of the 1959 amendment, a tax is barred regardless of its *form* if federal obligations must be considered, either directly or indirectly, in *computing* the tax. Giving the words of amended § 3701 their ordinary

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*Together with *Bank of Texas et al.* v. *Childs et al.*, and *Wynnewood Bank & Trust et al.* v. *Childs et al.*, also on certiorari to the same court (see this Court's Rule 19.4).

meaning, there can be no question that federal obligations were considered in computing the bank shares tax at issue here. The express exceptions to the 1959 amendment—franchise taxes and estate and inheritance taxes—reinforce this conclusion. The fact that the Texas tax statute, on its face, does not require use of the equity capital formula or any other formula based on the value of federal obligations is immaterial. The tax assessors in fact used the equity capital formula, which is the usual and customary method employed in Texas, and thus the taxes at issue violated § 3701's plain language. Pp. 862–865.

(b) The legislative history of the 1959 amendment supports construction of the amendment according to its plain language. Nothing in that history suggests that Congress considered shares taxes to fall outside the scope of the prohibition. Rather, Congress intended to sweep away formal distinctions and to invalidate all taxes measured directly or indirectly by the value of federal obligations, except those taxes specified in the amendment. Pp. 865–867.

2. Nor is the Texas tax authorized by Rev. Stat. § 5219, as amended. That statute provides only that States may not impose discriminatory taxes on national banks. Section 5219 is capable of coexistence with the plain language of § 3701, as amended, and there is no justification for construing § 5219 to create an inconsistency. An unexpressed congressional authorization to tax bank shares at their full value should not be read into the plain language of § 5219 on the basis of the language of that section as it existed before it was amended in 1969. Before 1969, § 5219 authorized the States to tax national banks in specified ways, including taxing bank shares. However, that version did not mention federal obligations; § 5219 was, and still is, addressed to the historically and analytically distinct federal interest in prohibiting state taxes that impose an intolerable burden on national banks. The prior version of § 5219 need not be read as giving implied consent to taxation of federal obligations, and the plain language of § 3701, as amended in 1959, need not be seen as an "implied repeal" of the pre-1969 version of § 5219. The doctrine disfavoring implied repeals thus is irrelevant here. Pp. 867–873.

615 S. W. 2d 810 (*Bank of Texas* judgment), *American Bank & Trust Co.* judgment, and *Wynnewood Bank & Trust* judgment reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 873. O'CONNOR, J., took no part in the consideration or decision of the cases.

Marvin S. Sloman argued the cause for petitioners. With him on the briefs were *Brian M. Lidji, Peter S. Chantilis, Cecilia H. Morgan, Roy Coffee, Christopher G. Sharp,* and *Bruce W. Bowman, Jr.*

Ernest J. Brown argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee, Assistant Attorney General Archer,* and *Michael L. Paup.*

Carroll R. Graham argued the cause for respondents City of Dallas et al. With him on the brief were *Douglas H. Conner III* and *Jan W. Fletcher. Earl Luna* argued the cause for respondents Dallas County et al. With him on the briefs was *Randel B. Gibbs. Henry D. Atkin, Jr.,* filed a brief for respondents Richardson Independent School District et al. *Charles M. Hinton, Jr.,* filed a brief for respondents City of Garland et al.†

JUSTICE BLACKMUN delivered the opinion of the Court.

The question presented is whether a Texas property tax on bank shares, computed on the basis of the bank's net assets without any deduction for tax-exempt United States obligations held by the bank, violates Rev. Stat. § 3701, as amended. The Texas Court of Civil Appeals ruled that it did not.

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†Briefs of *amici curiae* urging reversal were filed by *William H. Smith* and *Michael F. Crotty* for the American Bankers Association; and by *Frank A. Sinon* and *Sherill T. Moyer* for the Dale National Bank.

Briefs of *amici curiae* urging affirmance were filed by *Michael J. Bowers,* Attorney General, *Robert S. Stubbs II,* Executive Assistant Attorney General, *H. Perry Michael,* First Assistant Attorney General, *Verley J. Spivey,* Senior Assistant Attorney General, and *James C. Pratt,* Assistant Attorney General, for the State of Georgia; and by *C. Richard Fine* for the Texas Association of Appraisal Districts et al.

Briefs of *amici curiae* were filed by *Mike Westergren, Alan Gallagher, J. Bruce Aycock,* and *Felix Hallum George, Jr.,* for Nueces County, Texas, et al.; and by *Jay D. Howell, Jr.,* and *Daniel Doherty* for the City of Houston.

I

Until 1959, Rev. Stat. § 3701, 31 U. S. C. § 742, provided, in pertinent part, that "[a]ll stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority." This Court consistently held that this language prohibited state taxes imposed *on* federal obligations, either directly, or indirectly as part of a tax on the taxpayer's total property or assets. See *Society for Savings* v. *Bowers*, 349 U. S. 143, 147–148 (1955). The Court also consistently held, however, that § 3701 did not prohibit nondiscriminatory taxes imposed on discrete property interests such as corporate shares or business franchises, even though the value of that discrete interest was measured by the underlying assets, including United States obligations. See *Werner Machine Co.* v. *Director of Taxation*, 350 U. S. 492, 493–494 (1956); *Society for Savings* v. *Bowers*, 349 U. S., at 147–148; *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103, 112 (1923); *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 518–519 (1907); *Provident Institution* v. *Massachusetts*, 6 Wall. 611, 629–632 (1868). Similarly, the Court interpreted Rev. Stat. § 3701 not to prohibit taxes imposed on a discrete transaction, such as an inheritance, even though the value of the inheritance was measured according to the value of the federal obligations transferred. *Plummer* v. *Coler*, 178 U. S. 115, 133–134 (1900). In 1956, the Court observed that this formal but economically meaningless distinction between taxes on Government obligations and taxes on separate interests was "firmly embedded in the law." *Society for Savings* v. *Bowers*, 349 U. S., at 148.

In 1959, Congress amended § 3701 by adding a second sentence: "This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax," with exceptions only for nondiscriminatory franchise taxes or other nonproperty taxes, and for estate or inheritance taxes. Act of Sept. 22, 1959,

§ 105(a), 73 Stat. 622.[1] The issue is whether this amendment extends to a state bank shares tax.

II

In 1979 and 1980, Texas imposed a property tax on bank shares and a separate tax on the real estate holdings of banks. Tex. Rev. Civ. Stat. Ann., Art. 7166 (Vernon 1960).[2]

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[1] Section § 3701, as so amended, 31 U. S. C. § 742, read:

"[A]ll stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes."

Title 31 of the United States Code was not enacted into positive law until 1982, when it was reformulated without substantive change. Rev. Stat. § 3701, 31 U. S. C. § 742, then was replaced by 31 U. S. C. § 3124(a) (1982 ed.). Act of Sept. 13, 1982, 96 Stat. 877, 945. Because the state taxes at issue here were levied in 1979 and 1980, the former Rev. Stat. § 3701, as amended, rather than the present 31 U. S. C. § 3124(a) (1982 ed.) technically controls these cases.

[2] As of January 1, 1982, Art. 7166 was replaced by substantively similar provisions of the Texas Property Tax Code. See Tex. Tax Code Ann. §§ 21.09, 22.06, 23.11, 25.14 (1982). Until 1982, and at all times pertinent to these cases, Tex. Rev. Civ. Stat. Ann., Art. 7166 (Vernon 1960), read, in relevant part:

"Every banking corporation, State or national, doing business in the State shall, in the city or town in which it is located, render its real estate to the tax assessor at the time and in the manner required of individuals. At the time of making such rendition the president or some other officer of said bank shall file with said assessor a sworn statement showing the number and amount of shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by him. Every shareholder of said bank shall, in the city or town where said bank is located, render at their actual value to the tax assessor all shares owned by him in such bank; and in case of his failure to do so, the assessor shall assess such unrendered shares as other unrendered property. Each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. . . . Nothing herein shall be so construed as to tax national or

It required each bank doing business in the State to report its real estate to the local tax assessor, and to submit a list of its shareholders with the number of shares owned by each. The shareholders were required to report the actual value of their shares to the assessor in the bank's jurisdiction. To prevent double taxation, each share was to be taxed to the shareholder on the difference between the share's cash value and the proportionate amount per share of the bank's real estate assessment.

Petitioners are certain state and national banks and their shareholders. Respondents are taxing subdivisions of the State of Texas, and officers and Boards of Equalization of those subdivisions, that levied taxes on petitioners' bank shares pursuant to Art. 7166. In determining the value of the bank shares subject to the tax, respondents included the value of United States obligations held by the banks. Petitioners sought mandamus, declaratory, and injunctive relief against respondents in state court, asserting that § 3701 required that the value of their bank shares be reduced by the proportionate value of the United States obligations held by the bank.

In its initial opinion concerning petitioner Bank of Texas, the Texas Court of Civil Appeals held that the plain language of § 3701, as amended, precludes consideration of United States obligations in the computation of any state or local tax. App. to Pet. for Cert. 50a. On motions for rehearing, the court withdrew its original opinion and, instead, upheld the tax. *Bank of Texas* v. *Childs*, 615 S. W. 2d 810 (1981). The court stated that, prior to the 1959 amendment to § 3701, a different statute, Rev. Stat. § 5219, as amended, 12 U. S. C. § 548,[3] had authorized state taxation of shares of national

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State banks, or the shareholders thereof, at a greater rate than is assessed against other moneyed capital in the hands of individuals."

[3] Before its amendment in 1969, Rev. Stat. § 5219, as amended by the Act of Mar. 25, 1926, ch. 88, 44 Stat. 223, 12 U. S. C. § 548, provided, in relevant part:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of banks without reduction in value for obligations of the United States held by the banks. 615 S. W. 2d, at 817–820. The court concluded that the 1959 amendment to § 3701 had not withdrawn this authorization. 615 S. W. 2d, at 819–820. The court reasoned that if the 1959 amendment had withdrawn the authorization granted by § 5219, in effect it would have repealed a portion of that statute, and that repeals by implication are not favored. 615 S. W. 2d, at 820–822.[4] Similar judgments were entered in companion cases. App. to Pet. for Cert. 2a, 41a. The Court of Civil Appeals denied motions for rehearing, 615 S. W. 2d, at 823–826; App. to Pet. for Cert. 3a, 42a. The Supreme Court of Texas denied applications for writs of error. *Id.*, at 4a, 39a, 43a.

Because the decisions of the Court of Civil Appeals appeared to be inconsistent with decisions of the Supreme Court of Montana,[5] and because of the importance of the issue, we granted certiorari. 459 U. S. 966 (1982).

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national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income. . . ."

The statute required that any such tax comply with certain conditions, principally designed to prohibit discrimination against national banks.

As amended in 1969, § 5219 provides: "For the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." Pub. L. 91–156, § 2(a), 83 Stat. 434.

[4] The court also rejected claims that the tax violated state law and the United States Constitution by placing a tax burden on banks heavier than it placed on other "moneyed capital" in the State. 615 S. W. 2d, at 813–816, 822–823. These holdings are not before us.

[5] *Montana Bankers Assn.* v. *Montana Dept. of Revenue*, 177 Mont. 112, 580 P. 2d 909 (1978); *First Security Bank of Bozeman* v. *Montana Dept. of Revenue*, 177 Mont. 119, 580 P. 2d 913 (1978). The Supreme Court of Georgia has upheld a similar bank shares tax. *Bartow County Bank* v. *Bartow County Board of Tax Assessors*, 248 Ga. 703, 285 S. E. 2d 920 (1982), appeal docketed, No. 81–1834.

III

A

"Absent a clearly expressed legislative intention to the contrary, [the statutory] language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). The exemption for federal obligations provided by § 3701, as amended in 1959, is sweeping: with specific exceptions, it "extends to *every form* of taxation that would require that either the obligations or the interest thereon, or both, *be considered, directly or indirectly, in the computation* of the tax" (emphasis supplied). See *Memphis Bank & Trust Co.* v. *Garner*, 459 U. S. 392, 395–396 (1983) (the statute "establishes a broad exemption").

The 1959 amendment rejected and set aside this Court's rather formalistic pre-1959 approach to § 3701. Under that approach, if a tax were imposed on a property interest or transaction separate from the ownership of federal obligations, the method by which the tax was computed was entirely irrelevant. *Plummer* v. *Coler*, 178 U. S., at 129; *Home Ins. Co.* v. *New York*, 134 U. S. 594, 600, 602, 606 (1890). This remained true despite the Court's recognition that the practical impact of such a tax is indistinguishable from that of a tax imposed directly on corporate assets that include federal obligations. See *Society for Savings* v. *Bowers*, 349 U. S., at 148. Under the plain language of the 1959 amendment, however, the tax is barred regardless of its *form* if federal obligations must be considered, either directly or indirectly, in *computing* the tax.

Giving the words of amended § 3701 their ordinary meaning, there can be no question that federal obligations were considered in computing the bank shares tax at issue here. In context, the word "considered" means taken into account, or included in the accounting.[6] The tax at issue was computed by use of an "equity capital formula," which involved determining the amount of the bank's capital assets, subtracting from that figure the bank's liabilities and the assessed value of the bank's real estate, and then dividing the result by the number of shares. 615 S. W. 2d, at 816. Plainly, such a tax takes into account, at least indirectly, the federal obligations that constitute a part of the bank's assets. Cf. *Society for Savings* v. *Bowers*, 349 U. S., at 146–147 (tax on total assets of corporation is tax on federal obligations it owns); *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U. S. 665, 672–673 (1950) (same); *Bank Tax Case*, 2 Wall. 200, 208–209 (1865) (same).[7]

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[6] Respondents Dallas County et al. suggest that "considered" may mean "characterized by deliberate thought," so that a tax would be invalid under

The express exceptions to the 1959 amendment—franchise taxes and estate and inheritance taxes—reinforce this conclusion. Just as state tax laws relating to corporate or bank shares generally assess the shares according to the value of the corporation's assets, see *Society for Savings* v. *Bowers*, 349 U. S., at 148, franchise and estate and inheritance taxes customarily assess the franchise or the demise at the value of the assets of the business or at the value of the property inherited. See, *e. g.*, *Werner Machine Co.* v. *Director of Taxation*, 350 U. S., at 492 (franchise tax measured by "net worth"); *Plummer* v. *Coler*, 178 U. S., at 134 (inheritance tax measured by "the value of the property passing"); *Home Ins. Co.* v. *New York*, 134 U. S., at 599 (franchise tax measured by "capital stock and dividends").

Prior to the 1959 amendment, franchise and estate and inheritance taxes measured by the value of federal obligations,

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the section only if the tax assessor subjectively knew that the bank's assets included federal obligations. Brief for Respondents Dallas County et al. 8–9. Respondents do not explain why Congress might have believed the subjective knowledge of the tax assessor worthy of federal concern. Moreover, on its face, the statute bars taxes requiring that federal obligations be considered "indirectly" in computing the tax.

[7] A Texas Court of Civil Appeals itself has stated that each asset of a bank, apart from real estate holdings, is "included and considered in arriving at the value of the Bank's shares." *City of Midland* v. *Midland National Bank*, 607 S. W. 2d 303, 304 (1980).

like bank shares taxes, were upheld on the theory that the tax was levied on the franchise or the transfer of property, rather than on the ownership interest in the federal securities themselves. By expressly exempting franchise and estate and inheritance taxes from the amended § 3701, Congress manifested its awareness that the new language would broaden significantly the prohibition as it had been construed by the courts. Congress must have believed that franchise and estate and inheritance taxes required federal obligations to "be considered, directly or indirectly, in the computation of the tax"; otherwise, the specific exemptions for these taxes would have been superfluous. There is no reason to conclude that shares taxes are any different.

The language of § 3701 encompasses "every form of taxation," and is inconsistent with implied exceptions. Cf. *Lewis* v. *United States*, 445 U. S. 55, 60–62 (1980). From the specific exceptions for franchise and estate and inheritance taxes, and the conspicuous omission of shares taxes from that group, only one inference is possible: Congress meant to bar shares taxes to the extent they consider federal obligations in the computation of the tax. Cf. *Andrus* v. *Glover Construction Co.*, 446 U. S. 608, 616 (1980); *Andrus* v. *Allard*, 444 U. S. 51, 56 (1979).[8]

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[8] The unenacted 31 U. S. C. § 742, which codified Rev. Stat. § 3701, included the introductory phrase "Except as otherwise provided by law . . . ." Rev. Stat. § 3701 itself did not include that phrase, however, and the Statutes at Large prevail over the Code whenever the two are inconsistent. *Stephan* v. *United States*, 319 U. S. 423, 426 (1943). In fact, Congress was aware that Rev. Stat. § 3701 did not contain this phrase. Both the House and Senate Reports, although mentioning the phrase at one point, see S. Rep. No. 909, 86th Cong., 1st Sess., 11 (1959) (Senate Report); H. R. Rep. No. 1148, 86th Cong., 1st Sess., 12 (1959) (House Report), properly set forth the statute without the introductory clause. Senate Report, at 22; House Report, at 25. Moreover, the Reports summarized the amendment as making clear that, with specified exceptions, "both the principal and interest on U. S. obligations are exempt from all State taxes except . . . ." Senate Report, at 2; House Report, at 2. There was no suggestion that some category of state taxes apart from those specifically preserved was to be impliedly excepted.

Respondents Dallas County et al. argue, however, that § 3701 does not prohibit the Texas tax because, on its face, the tax statute does not require use of the equity capital formula or any other formula based on the value of federal obligations. Brief for Respondents Dallas County et al. 10–11. In the present litigation, however, the assessors did use the equity capital formula, which is the usual method for assessing the value of bank shares, see *Society for Savings* v. *Bowers*, 349 U. S., at 148,[9] and is "the usual and customary method used in Texas to arrive at such value." *City of Midland* v. *Midland National Bank*, 607 S. W. 2d 303, 304 (1980). Respondents have not cited a single instance where a different formula was employed. Section 3701 prohibits any form of tax that would require consideration of federal obligations in computing the tax; it cannot matter whether such consideration is mandated by the tax assessor in practice or by the state statute in so many words.[10] The taxes at issue therefore violated the plain language of § 3701.

B

The legislative history of the 1959 amendment to § 3701, while not extensive, supports this construction of the amendment's effect. The catalyst for the amendment was an Idaho tax "upon every individual . . . which shall be according to and measured by his net income." See Idaho Code § 63–3011

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[9] At the time the contested taxes were levied, at least six States other than Texas imposed a bank shares tax. Of the six statutes, five explicitly required that the share's value be determined according to the value of the bank's assets. See Ga. Code Ann. § 48–6–90 (1982); La. Rev. Stat. Ann. § 47:8 (West 1970) and § 47:1967(C) (West Cum. Supp. 1982); Nev. Rev. Stat. § 367:025 (1981); Ohio Rev. Code Ann. § 5725.04 (1980) (repealed, effective Jan. 1, 1983, see Ohio Rev. Code Ann. § 5725.04 (Supp. 1982)); Pa. Stat. Ann., Tit. 72, § 7701 (Purdon Supp. 1982). One of the statutes, like Texas', did not specify the method by which the assessment was to be made. See W. Va. Code § 11–3–14 (1974).

[10] Accordingly, we need not decide whether Texas, by the use of some other method of assessing the shares, could avoid the plain prohibition of the statute.

(1948). Despite this Court's holding that § 3701 precluded direct state taxation of the interest on federal obligations, as well as taxation of the underlying obligations, see *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U. S., at 675–676, Idaho's position was that its tax need not exempt the interest received on federal obligations, because it was imposed on the individual and was merely measured by his net income, rather than being imposed on the income itself. See Hearings on Public Debt Ceiling and Interest Rate Ceiling on Bonds before the House Committee on Ways and Means, 86th Cong., 1st Sess., 69–70 (1959) (supplemental statement of Secretary of the Treasury Anderson) (Hearings). In presenting the 1959 amendment to Congress, the Secretary described Idaho's position as "rest[ing] upon a distinction of words which is without substance." *Id.*, at 71. Similar accusations had been leveled at this Court's analogous distinctions between shares taxes and franchise taxes on the one hand, and taxes on corporate assets on the other.[11]

Respondents suggest, however, that the 1959 amendment was intended only to make clear that income taxes like Idaho's, on interest from federal obligations, were unlawful. Congress, according to respondents, did not mean to set aside this Court's well-established distinction between taxes on assets and taxes on shares. We, however, have found no evidence whatsoever in the legislative history to suggest that Congress considered shares taxes to fall outside the scope of the prohibition. The fact that the 1959 legislative history refers to the Idaho tax, but not specifically to bank shares taxes, does not raise a "negative inference" limiting the amendment to this specific problem. *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 679 (1983). The amendment plainly did more than make clear that the interest on federal obligations was tax exempt. Idaho relied on the formal distinction between a tax on an individual, measured by his net income, and a tax on the income itself. See Hearings, at 70. To answer this argument, the amendment abolished the formalistic inquiry whether the tax is *on* a distinct interest, and replaced it with the inquiry whether "computation of the tax" requires consideration of federal obligations.

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[11] See, *e. g.*, *Van Allen* v. *Assessors*, 3 Wall. 573, 598–599 (1866) (Chase, C. J., concurring); 67 Cong. Rec. 6085–6986 (1926) (colloquy of Reps. Wingo and Cooper) (legalizing franchise tax measured by assets including federal obligations is "a use of words to conceal an idea"; "the decision of the Supreme Court which arrived at [that] conclusion gave me a headache, and it took me considerable time to be able to comprehend it"); *id.*, at 6088 (remarks of Rep. Stevenson) ("the Supreme Court of the United States frequently obscures ideas by language as well as statesmen when they are on the stump. . . . When they held that the stock was taxable, although every dollar of it was invested in United States bonds, which were expressly exempt from taxation, they held practically the same thing"). See also *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 628–629 (1929); *Society for Savings* v. *Bowers*, 349 U. S., at 148.

Nor can the 1959 amendment be read to apply only to income taxes; it reaches "*every* form of tax . . ." (emphasis supplied). Indeed, Congress felt compelled to exempt estate and inheritance and franchise taxes from the scope of its amendment precisely because the amendment was *not* limited to income taxes. Congress understood the amendment's effect; both the Senate and House Reports explained that the amendment "makes it clear that both the principal and interest on U. S. obligations are exempt from *all State taxes* except nondiscriminatory franchise, etc., taxes" (emphasis supplied). Senate Report, at 2; House Report, at 2. Congress intended to sweep away formal distinctions and to invalidate all taxes measured directly or indirectly by the value of federal obligations, except those specified in the amendment.

IV

In an effort to avoid this result and to resurrect the formalistic approach, respondents embark on a tour of the history of an entirely different statute, Rev. Stat. § 5219, as amended, 12 U. S. C. § 548. Section 5219, they argue, authorizes States to tax the full value of bank shares, and the 1959 amendment to § 3701 did not repeal that authorization by implication. Even if the 1959 Congress abolished the distinction between taxes on and taxes measured by the value of federal obligations, respondents conclude, the Texas tax is valid.

It is true, of course, that "repeals by implication are not favored." *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936). This doctrine flows from the basic principle that "courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974). But, at the time the taxes at issue were assessed, § 5219 was clearly capable of coexistence with the plain language of § 3701 as amended in 1959, and there is no justification for construing § 5219 to create an inconsistency.

When the taxes challenged here were assessed, and now, § 5219 provided only that States could not impose discriminatory taxes on national banks: "For the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." Section 3701's requirement that shares taxes on all corporations not consider federal obligations in their computation easily coexists with § 5219's simple ban on discriminatory taxation of national banks. Giving each statute its common-sense meaning, the proper result in these cases could not be more clear.

Respondents, though, find an unexpressed exception for bank shares taxes in the plain language of § 3701 by reading into the plain language of § 5219 an unexpressed congressional authorization to tax bank shares at their full value. Respondents argue that this silent authorization may be found in § 5219 by looking to the pre-1969 language of that section. Even assuming that such an adventure in statutory revision would be an appropriate exercise of judicial power, respondents' argument is based on an unnecessary construction of this earlier version of § 5219.

From 1926 until 1969, § 5219 provided that the States could tax national banks in only four ways: (1) by taxing bank shares, (2) by including bank share dividends in the taxable income of a shareholder, (3) by taxing national banks on their net income, or (4) by levying a franchise tax on national banks "according to or measured by their net income." Act of Mar. 25, 1926, ch. 38, 44 Stat. 223; see n. 3, *supra*. Respondents argue that this statute not only permitted these forms of taxation of national banks, but that in so doing it also implicitly authorized the taxation of any federal obligations held by national banks, notwithstanding independent limitations placed on taxation of federal obligations.[12]

Although respondents' reading might be a plausible construction of the prior version of § 5219, the prior version need not be so construed. That version did not mention federal obligations; § 5219 was, and still is, addressed to the concern first considered in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), where this Court declared that any tax on the operation of a national bank unconstitutionally burdened this instrumentality of the Federal Government. The original predecessor of § 5219, § 41 of the 1864 National Bank Act, 13

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[12] The unenacted phrase "Except as otherwise provided by law," added to the text of Rev. Stat. § 3701 by the codifiers of the United States Code in 1926, see n. 8, *supra*, almost certainly did not refer to § 5219 or its predecessors. The drafters probably inserted the language as a cross-reference to the Act of Aug. 13, 1894, ch. 281, 28 Stat. 278, which had legislatively overruled *Bank* v. *Supervisors*, 7 Wall. 26 (1869), and modified § 3701 to the extent of removing the exemption from circulating notes and other notes circulating as currency. See W. McClenon & W. Gilbert, Index to the Federal Statutes 1874–1931, p. 1243 (1933) (listing Act of Aug. 13, 1894, as an implied amendment of Rev. Stat. § 3701). In the preface to the 1926 edition of the United States Code, at v, it is said: "Acknowledgement of valuable assistance is given to W. H. McClenon. . . ."

Stat. 111, permitted state taxation of national banks only on their real estate and shares; such taxes, *McCulloch* indicated, did not violate the Constitution's protection of national banks. 4 Wheat., at 436–437. But whether a tax imposes an intolerable burden on national banks, and whether it imposes an intolerable burden on federal obligations by threatening to diminish their value, are questions that are historically and analytically distinct. Section 3701 responds to the latter concern, first addressed in *Weston* v. *City Council of Charleston*, 2 Pet. 449 (1829). Congress might well conclude that a tax not imposing an undue burden on national banks does unduly burden federal obligations, and § 5219 and § 3701 have always been directed to, and have protected, these separate federal interests.

A state tax affecting national banks holding federal obligations implicates both federal concerns, and therefore confronts both federal barriers to state taxation. Under the statutory scheme in effect in 1959, the year § 3701 was amended, a tax not satisfying the requirements of § 5219 was invalid whether or not it also satisfied the requirements of § 3701. Compare *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 676, 682–683 (1899) (franchise taxation of national bank violated predecessor to § 5219 prior to 1926 amendment of that statute, which permitted for the first time franchise taxes on national banks), with *Provident Institution* v. *Massachusetts*, 6 Wall., at 630–632 (franchise tax on state corporation not unlawful burden on federal obligations). Similarly, there was no reason to believe that a tax that violated § 3701 could be imposed on a bank merely because it did not also violate § 5219. Indeed, while § 5219 explicitly had permitted the levying of an income tax on national banks since 1923, see Act of Mar. 4, 1923, ch. 267, 42 Stat. 1499, it was never contended that this permitted the inclusion of interest from federal obligations in the national banks' taxable income.[13]

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[13] Inclusion of interest from federal obligations in income for the purposes of state income taxes was prohibited by the pre-1959 version of § 3701, be-

Although it might be inferred from dicta in certain cases that the prior version of § 5219 implicitly authorized a State's refusal to deduct the value of federal obligations from the assessed value of national bank shares, see, *e. g.*, *Cleveland Trust Co.* v. *Lander*, 184 U. S. 111, 115 (1902); *Van Allen* v. *Assessors*, 3 Wall. 573, 584–588 (1866), this implication has not been necessary for any of the Court's decisions in this area. In the context of bank shares taxes, until the 1959 amendment of § 3701 the prohibitions of § 3701 and § 5219 were coextensive. Because they were permitted expressly by § 5219, such taxes did not violate the proscription of taxes on national banks. And regardless of the manner in which a shares tax was computed, it did not violate § 3701 because it was assessed on an interest separate from the federal obligations held by the bank. See, *e. g.*, *Society for Savings* v. *Bowers*, 349 U. S., at 147. There was therefore no cause to consider whether § 5219 implicitly granted powers to burden federal obligations held by national banks that otherwise would have been denied by § 3701.[14]

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cause the tax was imposed on, rather than being measured by, the interest. The States' inability to include interest from federal obligations in an income tax was the primary reason the predecessor to § 5219 was amended in 1926 to permit the imposition on national banks of nondiscriminatory franchise taxes based on corporate income. See 67 Cong. Rec. 6085 (1926) (remarks of Rep. Wingo); T. Anderson, Federal and State Control of Banking 217–219 (1934).

[14] Thus, we do not "disregar[d]" these cases, as the dissent contends. *Post*, at 874. We simply observe that like the former § 5219 itself these cases were ambiguous about the relationship of § 5219 to taxation of federal obligations and § 3701, and that their results in no way turned on an exception to § 3701 created by § 5219. In *Van Allen* v. *Assessors*, for example, the Court did not state unambiguously, as the dissent implies, *post*, at 875, that § 5219 independently recognized the State's power to tax *federal obligations* "irrespective of § 3701," *post*, at 876, but rather stated that the statute recognized the State's power to tax the shares of *national banks*. See 3 Wall., at 586. The *Van Allen* Court held that a bank shares tax did not illegally tax the United States obligations that constituted the capital of the bank, because the shares were "a distinct independent interest or property, held by the shareholder like any other property that may belong

The prior version of § 5219 thus need not be read as giving implied consent to taxation of federal obligations; on its face it was addressed only to the separate interdiction on taxation of national banks, and it never was necessary to decide whether implicitly it reached further. The plain language of § 3701, as amended in 1959, therefore need not be seen as an "implied repeal" of the pre-1969 version of § 5219. The 1959 amendment of § 3701 left § 5219 entirely intact. All taxes on national banks except those enumerated in § 5219 still were unlawful. A shares tax on a national bank still was lawful. The 1959 amendment simply limited the ability of States to consider federal obligations when levying *any* form of tax, taxes on national banks included. States still could reach the value of federal obligations by imposing the other effective form of taxation permitted by § 5219, a franchise tax, which

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to him." *Id.*, at 584. Similarly, in *Cleveland Trust Co.* v. *Lander*, the Court recognized that it was well established that Rev. Stat. § 3701 did not bar a tax on the separate individuality of shareholders. 184 U. S., at 115. And in *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103 (1923), relied upon, *post*, at 876, the Court addressed § 3701's application to a shares tax on national banks and held that "[a]s respects national banks, the rule is the same as with corporations in general": "[t]he difference [between a lawful and an unlawful tax on United States obligations] turns on the distinction between the corporate assets and the shares,—the one belonging to the corporation as an artificial entity and the other to the stockholders," 263 U. S., at 112. The *Fairweather* Court's reference to *Van Allen*'s ruling as "settled law," 263 U. S., at 114, in context appears to refer principally to this distinction, see *id.*, at 113–115. Any oblique suggestions in these cases that § 5219 independently defined the States' authority to reach the value of federal obligations held by national banks were wholly superfluous.

Finally, the "firmly embedded" exception to the general rule of immunity of federal obligations from state taxation noted in *Society for Savings* v. *Bowers*, 349 U. S., at 148, was *not* an immunity afforded by § 5219. Cf. *post*, at 876. Section 5219 was not mentioned in *Bowers*. The *Bowers* Court referred to an immunity entirely internal to § 3701, one based on "the theory that . . . a tax on the stockholders' interests is not a tax on the federal obligations which are included in the corporate property." 349 U. S., at 147. The 1959 amendment to § 3701 certainly abolished the relevance of this formalistic theory.

was expressly excepted from the prohibition contained in the amended language of § 3701.

The doctrine disfavoring implied repeals thus is irrelevant for these cases. It does not justify the use of an unnecessary construction of the language of an ambiguous statute that no longer is on the books to defeat the plain language of an effective statute. This is particularly true when, as here, the "impairment" of the prior statute is minimal even if the prior statute is construed so as to maximize its conflict with the later one. See *Andrus* v. *Glover Construction Co.*, 446 U. S., at 618–619. Given its current language, which does not mention or even arguably authorize *any* form of tax, it would be singularly inappropriate for this Court to hold for the first time that § 5219 authorizes the imposition of taxes that otherwise would violate § 3701.[15]

V

Nothing in the legislative history of the 1959 amendment to § 3701 contradicts its plain language. Nor is the plain language of the amendment inconsistent with any other federal statute. In these circumstances, the plain language of § 3701 is controlling. The judgments of the Texas Court of Civil Appeals are therefore reversed.

It is so ordered.

JUSTICE O'CONNOR took no part in the consideration or decision of these cases.

JUSTICE REHNQUIST, with whom JUSTICE STEVENS joins, dissenting.

I agree with the Court that the plain language of the tax exemption for federal obligations, Rev. Stat. § 3701, as amended, 31 U. S. C. § 742, seems quite broad. *Ante*, at 862. See *Memphis Bank & Trust Co.* v. *Garner*, 459 U. S. 392 (1983). If this general provision is viewed in isolation, then the Court's argument is persuasive that it proscribes the Texas property tax on bank shares at issue in these cases because that tax is computed without any reduction for federal obligations held by state and national banks. *Ante*, at 862–865. I do not believe, however, that we can take such a detached look at § 3701 when this Court has for over 100 years consistently said that a different statute, Rev. Stat. § 5219, as amended, 12 U. S. C. § 548, specifically controls the question presented here. Since today the Court disregards these precedents, I dissent.

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[15] Moreover, the Court of Civil Appeals' approach would ascribe to Congress the implausible intention to outlaw consideration of federal obligations in computing all taxes on shareholders, except taxes on shareholders of banks. As discussed above, state taxation of national banks historically has been thought to pose a threat to a federal interest independent of the threat posed by state taxation of federal obligations. Policy and logic suggest that Congress could not have meant to single out national banks for disfavored treatment.

An entire chapter of American legal history is occupied by efforts to establish different versions of what may be loosely referred to as "national banks." This chapter is of course reflected in the decisions of this Court, where in a series of early cases the Court consistently determined that it was Congress' intention to protect the National Bank from taxation by the States. See *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819); *Osborn* v. *Bank of United States*, 9 Wheat. 738 (1824). Somewhat later the Court decided that States could not tax United States securities when those securities were owned by state banks. *New York ex rel. Bank of Commerce* v. *Commissioners of Taxes of New York City*, 2 Black 620 (1863); *Bank Tax Case*, 2 Wall. 200 (1865).

In *Van Allen* v. *Assessors*, 3 Wall. 573, 582 (1866), the Court was asked to decide "whether the State possesses the power to authorize the taxation of the shares of these national banks in the hands of stockholders, whose capital is wholly vested in stock and bonds of the United States?" It was argued that the predecessor of § 3701 ensured an exemption to such a tax by providing that "all stocks, bonds, and other securities of the United States held by individuals, corporations, or associations, within the United States, shall be exempt from taxation by or under State authority."

Act of Feb. 25, 1862, ch. 33, §2, 12 Stat. 346. 3 Wall., at 578.

While the Court did not address this argument in so many words, it implicitly rejected the contention by turning instead to the forerunner of §5219, a more specific statute which provided that nothing in the National Bank Act "shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority. . . ." Act of June 3, 1864, ch. 106, §41, 13 Stat. 112. The Court held that this provision recognizes "in express terms, the sovereign right of the State to tax" bank shares without a reduction for United States obligations. 3 Wall., at 586. "Nothing, it would seem, could be made plainer, or more direct and comprehensive on the subject. The language of the several provisions is so explicit and positive as scarcely to call for judicial construction." *Ibid.* See also *National Bank* v. *Commonwealth*, 9 Wall. 353, 359 (1869).

In 1878 Congress revised the statutes and enacted §3701 and §5219. Section 5219 was virtually identical to its immediate predecessor. The language of the exemption in §3701 was somewhat changed to provide: "All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local atuhority." In *Cleveland Trust Co.* v. *Lander*, 184 U. S. 111 (1902), an Ohio trust company, relying on §3701, made an argument similar to the one made in *Van Allen.* The Court reaffirmed its *Van Allen* decision and this time expressly rejected the §3701 claim of exemption. The Court explained:

> "The argument of the plaintiff in error claims a greater immunity from taxation for the shares of the Trust Company than section 5219 of the Revised Statutes of the United States gives to shares in national banks. That

> section permits the States to assess and tax the shares of shareholders in national banks. . . . In *Van Allen* v. *The Assessors*, 3 Wall. 573, the provision contained in section 5219—then a part of the act of Congress of June 3, 1864—came up for consideration. . . . The validity of the statute was sustained, and interpreting it the court said that it authorized the taxation of such shares, and shares were defined to be the whole interest of the holder without diminution on account of the kind of property which constituted the capital stock of the bank. Of the provisions of the act expressing this purpose and the right of the State to tax the court said nothing 'could be made plainer or more direct and comprehensive.' . . . The answer to the contention [that § 3701 requires a different result] is obvious and may be brief. The contention destroys the separate individuality recognized, as we have seen, by this court, of the trust company and its shareholders, and seeks to nullify one provision of the Revised Statutes of the United States (section 5219) by another (section 3701), between which there is no want of harmony." 184 U. S., at 113–115.

Thus, after *Van Allen* and *Cleveland Trust Co.* it was clear that, irrespective of § 3701, § 5219 authorized States to tax bank shares without excluding the value of the bank's capital vested in federal obligations. By 1923 the Court said that this principle "is now settled law in this court." *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103, 114 (1923). And in *Society for Savings* v. *Bowers*, 349 U. S. 143, 148 (1955), Justice Harlan, writing for the Court, explained that "this exception to the general rule of immunity is firmly embedded in the law." *

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*The Court attempts to avoid this line of cases by suggesting that almost everything said in several of these decisions was either "dicta," *ante*, at 871, or "ambiguous," *ante*, at 871, n. 14. Neither characterization can be

As the Court points out, in 1959 Congress amended § 3701 with broad language. *Ante*, at 858–859, and n. 1. But the *Van Allen* decision rested exclusively on § 5219 and permits a tax on bank shares regardless of § 3701 unless there is some indication that with the 1959 amendment to § 3701 Congress intended to repeal part of § 5219. Sensible meaning can be given to the amended § 3701 without finding a repeal by implication, and there is nothing in the language or history of the amendment to indicate a repeal by implication. In fact, the history of the amendment indicates that Congress did not intend to change the exemption; Congress amended § 3701 to make clear that an Idaho tax on interest earned on federal obligations ran afoul of the exemption. See S. Rep. No. 909, 86th Cong., 1st Sess. (1959); H. R. Rep. No. 1148, 86th Cong., 1st Sess. (1959).

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plausibly made concerning the holding in *Cleveland Trust Co.* v. *Lander*, 184 U. S. 111, 115 (1902), where the Court rejected the argument accepted by the Court today by saying that "the trust company . . . seeks to nullify one provision of the Revised Statutes of the United States (section 5219) by another (section 3701), between which there is no want of harmony." Likewise, as noted above, while *Van Allen* v. *Assessors*, 3 Wall. 573 (1866), did not expressly reject this argument, reliance on the predecessor of § 3701 was argued and the Court necessarily rejected it by basing its holding on § 5219.

I cannot agree with the Court's suggestion that the *Van Allen* and *Cleveland Trust Co.* decisions were not approved in later cases such as *Society for Savings* v. *Bowers*. Certainly, by the time *Society for Savings* was decided, the *Van Allen* doctrine had been carried beyond § 5219 to shares taxes on corporations other than banks. 349 U. S., at 147–148. The Court concludes that "[t]he 1959 amendment to § 3701 certainly abolished the relevance of this formalistic theory" with regard to nonbank corporations. *Ante*, at 872, n. 14. To the contrary, in light of the legislative history discussed in the text concerning the 1959 amendment, it is at a minimum debatable whether a shares tax without a reduction for federal obligations on any corporation is prohibited by § 3701. But that is another case; these cases present essentially the same issue presented in *Van Allen* and *Cleveland Trust Co.*, and like those decisions, we need go no further than § 5219 to decide it.

The Court does not contend otherwise, recognizing that "'repeals by implication are not favored.'" *Ante*, at 868 (quoting *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936)). The Court says, however, that the "doctrine disfavoring implied repeals . . . is irrelevant for these cases," *ante*, at 873, because "at the time the taxes at issue were assessed, § 5219 was clearly capable of coexistence with the plain language of § 3701 as amended in 1959, and there is no justification for construing § 5219 to create an inconsistency," *ante*, at 868. Ten years after § 3701 was amended, § 5219 also was amended. The latter section now provides: "For the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located."

Contrary to the Court's suggestion otherwise, the legislative history of the 1969 amendment indicates that the new provision in § 5219 was intended to extend the power of States to tax national banks; not to limit their power to tax bank shares. See 115 Cong. Rec. 38634 (1969) (remarks of Sen. Tower); *id.*, at 35399 (remarks of Sen. Proxmire). As the Senate Report clearly provided, the "broad statement of the law" now found in § 5219 is intended to express Congress' conclusion that "there is no longer any justification for Congress continuing to grant national banks immunities from State taxation which are not afforded State banks." S. Rep. No. 91–530, p. 2 (1969).

As noted above, the construction given to § 5219 in *Van Allen* and its progeny is now "firmly embedded in the law." *Society for Savings* v. *Bowers*, *supra*, at 148. We are not therefore, as the Court seems to believe, writing on a clean slate. As the Court said in *Ozawa* v. *United States*, 260 U. S. 178, 194 (1922):

> "We are asked to conclude that Congress, without the consideration or recommendation of any committee, without a suggestion as to the effect, or a word of debate

> as to the desirability, of so fundamental a change, . . . has radically modified a statute always theretofore maintained and considered as of great importance. It is inconceivable that a rule . . . , a part of our history as well as our law, welded into the structure of our national policy by a century of legislative and administrative acts and judicial decisions, would have been deprived of its force in such dubious and casual fashion."

Since the Court can point to nothing in the amendment to § 5219 which indicates that Congress intended to change the *Van Allen* rule and since there is no basis for finding that Congress repealed the rule by implication when it amended § 3701, I would affirm the decision of the Texas Court of Appeals.

BAREFOOT *v.* ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 82–6080. Argued April 26, 1983—Decided July 6, 1983

Petitioner was convicted of capital murder in a Texas state court after a jury trial. A separate sentencing hearing was then held before the same jury to determine whether the death penalty should be imposed. One of the questions submitted to the jury, as required by a Texas statute, was whether there was a probability that the petitioner would commit further criminal acts of violence and would constitute a continuing threat to society. In addition to introducing other evidence, the State called two psychiatrists, who, in response to hypothetical questions, testified that there was such a probability. The jury answered the question, as well as another question as to whether the killing had been deliberate, in the affirmative, thus requiring imposition of the death penalty. On appeal, the Texas Court of Criminal Appeals rejected petitioner's contention that such use of psychiatric testimony at the sentencing hearing was unconstitutional, and affirmed the conviction and sentence. Ultimately, after this Court had denied certiorari and the Texas Court of Criminal Appeals had denied a habeas corpus application, petitioner filed a petition for habeas corpus in Federal District Court raising the same claims with respect to the use of psychiatric testimony. The District Court rejected these claims and denied the writ, but issued a certificate of probable cause pursuant to 28 U. S. C. § 2253, which provides that an appeal may not be taken to a court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a state court "unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause." The Texas Court of Criminal Appeals again denied a habeas corpus application, as well as denying a stay of execution. Shortly thereafter, the Court of Appeals also denied a stay of execution pending appeal of the District Court's judgment. This Court, treating an application for stay of execution as a petition for a writ of certiorari before judgment, granted certiorari.

Held:

1. The Court of Appeals did not err in refusing to stay petitioner's death sentence. Pp. 887–896.

(a) Although it did not formally affirm the District Court's judgment, there is no question that the Court of Appeals ruled on the merits of the appeal in the course of denying a stay and that petitioner had ample opportunity to address the merits, and such practice was within the bounds of this Court's prior decisions, such as *Garrison* v. *Patterson*, 391 U. S. 464. The parties, as directed, filed briefs and presented oral arguments, thus making it clear that whether a stay would be granted depended on the probability of success on the merits. While it would have been advisable for the Court of Appeals to affirm expressly the District Court's judgment, as well as to deny the stay, the court's failure to do so does not conflict with *Garrison* and related cases. Although the Court of Appeals moved swiftly to deny the stay, this does not mean that its treatment of the merits was cursory or inadequate. On the contrary, the court's resolution of the primary issue on appeal, the admission of psychiatric testimony on dangerousness, reflects careful consideration. To remand to the Court of Appeals for verification that the District Court's judgment was affirmed, as petitioner urges, would be an unwarranted exaltation of form over substance. Pp. 888–892.

(b) The following procedural guidelines for handling applications for stays of execution on habeas corpus appeals pursuant to a certificate of probable cause are suggested: (1) A certificate of probable cause requires more than a showing of the absence of frivolity of the appeal. The petitioner must make a substantial showing of the denial of a federal right, the severity of the penalty in itself not sufficing to warrant automatic issuance of a certificate. (2) When a certificate of probable cause is issued, the petitioner must be afforded an opportunity to address the merits, and the court of appeals must decide the merits. (3) A court of appeals may adopt expedited procedures for resolving the merits of habeas corpus appeals, notwithstanding the issuance of a certificate of probable cause, but local rules should be promulgated stating the manner in which such cases will be handled and informing counsel that the merits of the appeal may be decided on the motion for a stay. (4) Where there are second or successive federal habeas corpus petitions, it is proper for the district court to expedite consideration of the petition, even where it cannot be concluded that the petition should be dismissed under 28 U. S. C. § 2254 Rule 9(b) because it fails to allege new or different grounds for relief. (5) Stays of execution are not automatic pending the filing and consideration of a petition for certiorari from this Court to a court of appeals which has denied a writ of habeas corpus. Applications for stays must contain the information and materials necessary to make a careful assessment of the merits and so reliably to determine whether a plenary review and a stay are warranted. A stay of execution should first be sought from the court of appeals. Pp. 892–896.

2. The District Court did not err on the merits in denying petitioner's habeas corpus petition. Pp. 896–905.

(a) There is no merit to petitioner's argument that psychiatrists, individually and as a group, are incompetent to predict with an acceptable degree of reliability that a particular criminal will commit other crimes in the future and so represent a danger to the community. To accept such an argument would call into question predictions of future behavior that are constantly made in other contexts. Moreover, under the generally applicable rules of evidence covering the admission and weight of unprivileged evidence, psychiatric testimony predicting dangerousness may be countered not only as erroneous in a particular case but also as generally so unreliable that it should be ignored. Nor, despite the view of the American Psychiatric Association supporting petitioner's view, is there any convincing evidence that such testimony is almost entirely unreliable and that the factfinder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings. Pp. 896–903.

(b) Psychiatric testimony need not be based on personal examination of the defendant but may properly be given in response to hypothetical questions. Expert testimony, whether in the form of an opinion based on hypothetical questions or otherwise, is commonly admitted as evidence where it might help the factfinder do its job. Although this case involves the death penalty, there is no constitutional barrier to applying the ordinary rules of evidence governing the use of expert testimony. Pp. 903–904.

(c) The Texas courts, the District Court, and the Court of Appeals properly rejected petitioner's argument that even if the use of hypothetical questions in predicting dangerousness is acceptable as a general rule, the use made of them in his case violated his right to due process of law. Pp. 904–905.

Affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 906. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post* p. 906. BLACKMUN, J., filed a dissenting opinion, in Parts I, II, III, and IV of which BRENNAN and MARSHALL, JJ., joined, *post*, p. 916.

Will Gray argued the cause for petitioner. With him on the briefs was *Carolyn Garcia*.

Jack Greenberg argued the cause for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae* urging reversal. With him on the brief were *James M. Nabrit III*, *Joel Berger*, *John Charles Boger*, *Deborah Fins*, *James S. Liebman*, and *Anthony G. Amsterdam*.

Douglas M. Becker, Assistant Attorney General of Texas, argued the cause for respondent. With him on the brief were *Jim Mattox*, Attorney General, and *David R. Richards*, Executive Assistant Attorney General.*

JUSTICE WHITE delivered the opinion of the Court.

We have two questions before us in this case: whether the District Court erred on the merits in rejecting the petition for habeas corpus filed by petitioner, and whether the Court of Appeals for the Fifth Circuit correctly denied a stay of execution of the death penalty pending appeal of the District Court's judgment.

I

On November 14, 1978, petitioner was convicted of the capital murder of a police officer in Bell County, Tex. A separate sentencing hearing before the same jury was then held to determine whether the death penalty should be imposed. Under Tex. Code Crim. Proc. Ann., Art. 37.071 (Vernon 1981),[1] two special questions were to be submitted to the

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**Joel I. Klein* filed a brief for the American Psychiatric Association as *amicus curiae* urging reversal.

Daniel J. Popeo, *Paul D. Kamenar*, and *Nicholas E. Calio* filed a brief for the Washington Legal Foundation as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Morris Harrell*, *Marna S. Tucker*, and *E. Barrett Prettyman, Jr.*, for the American Bar Association; by *Gerald H. Goldstein*, *Maury Maverick*, and *Burt Neuborne* for the Texas Civil Liberties Union et al.; and by *Jim Smith*, Attorney General of Florida, and *Charles Corces, Jr.*, Assistant Attorney General, for the State of Florida et al.

[1] Texas Code Crim. Proc. Ann., Art. 37.071 (Vernon 1981), provides:

"(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether jury: whether the conduct causing death was "committed deliberately and with reasonable expectation that the death of the deceased or another would result"; and whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." The State introduced into evidence petitioner's prior convictions and his reputation for lawlessness. The State also called two psychiatrists, John Holbrook and James Grigson, who, in response to hypothetical questions, testified that petitioner would probably commit further acts of violence and represent a continuing threat to society. The jury answered both of the questions put to them in the affirmative, a result which required the imposition of the death penalty.

On appeal to the Texas Court of Criminal Appeals, petitioner urged, among other submissions, that the use of psychiatrists at the punishment hearing to make predictions

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the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

"(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

"(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

"(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted."

The question specified in (b)(3) was not submitted to the jury.

about petitioner's future conduct was unconstitutional because psychiatrists, individually and as a class, are not competent to predict future dangerousness. Hence, their predictions are so likely to produce erroneous sentences that their use violated the Eighth and Fourteenth Amendments. It was also urged, in any event, that permitting answers to hypothetical questions by psychiatrists who had not personally examined petitioner was constitutional error. The court rejected all of these contentions and affirmed the conviction and sentence on March 12, 1980, *Barefoot* v. *State*, 596 S. W. 2d 875; rehearing was denied on April 30, 1980.

Petitioner's execution was scheduled for September 17, 1980. On July 29, this Court granted a stay of execution pending the filing and disposition of a petition for certiorari, which was filed and then denied on June 29, 1981. *Barefoot* v. *Texas*, 453 U. S. 913. Petitioner's execution was again scheduled by the state courts, this time for October 13, 1981. An application for habeas corpus to the Texas Court of Criminal Appeals was denied on October 7, 1981, whereafter a petition for habeas corpus was filed in the United States District Court for the Western District of Texas. Among other issues, petitioner raised the same claims with respect to the use of psychiatric testimony that he had presented to the state courts. The District Court stayed petitioner's execution pending action on the petition. An evidentiary hearing was held on July 28, 1982, at which petitioner was represented by competent counsel. On November 9, 1982, the District Court filed its findings and conclusions, rejecting each of the several grounds asserted by petitioner. The writ was accordingly denied; also, the stay of petitioner's death sentence was vacated. The District Court, however, granted petitioner's motion to proceed *in forma pauperis* and issued a certificate of probable cause pursuant to 28 U. S. C. § 2253, which provides that an appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a state court "unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause." Notice of appeal was filed on November 24, 1982.

At this point, the Texas courts set January 25, 1983, as the new execution date. A petition for habeas corpus and motion for stay of execution were then denied by the Texas Court of Criminal Appeals on December 21, 1982, and another motion for stay of execution was denied by the same court on January 11, 1983.

On January 14, petitioner moved the Court of Appeals for the Fifth Circuit to stay his execution pending consideration of his appeal from the denial of his petition for habeas corpus. On January 17, the parties were notified to present briefs and oral argument to the court on January 19. The case was heard on January 19, and, on January 20, the Court of Appeals issued an opinion and judgment denying the stay. 697 F. 2d 593 (1983). The court's opinion recited that the court had studied the briefs and record filed and had heard oral argument at which petitioner's attorney was allowed unlimited time to discuss any matter germane to the case. The Court of Appeals was of the view that by giving the parties unlimited opportunity to brief and argue the merits as they saw fit, the requirements set forth in this Court's cases, such as *Garrison* v. *Patterson*, 391 U. S. 464 (1968), *Nowakowski* v. *Maroney*, 386 U. S. 542 (1967), and *Carafas* v. *LaVallee*, 391 U. S. 234 (1968), were satisfied. As the court understood those cases, when a certificate of probable cause is issued by the district court, the court of appeals must give the parties an opportunity to address the merits. In its view, the parties had been given "an unlimited opportunity to make their contentions upon the underlying merits by briefs and oral argument." 697 F. 2d, at 596. The Court of Appeals then proceeded to address the merits of the psychiatric testimony issue, together with new claims not presented to the District Court, that the state court had no jurisdiction to resentence petitioner and that newly discovered evidence warranted a new trial. Each of the grounds was discussed by the court and rejected. The court concluded that since the petition had no substantial merit, a stay should be denied.

Petitioner then filed an application for stay of execution with the Circuit Justice for the Fifth Circuit, who referred the matter to the Court. On January 24, 1983, the Court stayed petitioner's execution and, treating the application for stay as a petition for writ of certiorari before judgment, granted certiorari. 459 U. S. 1169. The parties were directed to brief and argue "the question presented by the application, namely, the appropriate standard for granting or denying a stay of execution pending disposition of an appeal by a federal court of appeals by a death-sentenced federal habeas corpus petitioner, and also the issues on appeal before the United States Court of Appeals for the Fifth Circuit." *Ibid.* The case was briefed and orally argued here, and we now affirm the judgment of the District Court.

II

With respect to the procedures followed by the Court of Appeals in refusing to stay petitioner's death sentence, it must be remembered that direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review—which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari—comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely. The procedures adopted to facilitate the orderly consideration and disposition of habeas petitions are not legal entitlements that a defendant has a right to pursue irrespective of the contribution these procedures make toward uncovering constitutional error. "It is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be interfered with on mere pretexts." *Lambert* v. *Barrett*, 159 U. S. 660, 662 (1895). Furthermore, unlike a term of years, a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding. Accordingly, federal courts must isolate the exceptional cases where constitutional error requires retrial or resentencing as certainly and swiftly as orderly procedures will permit. They need not, and should not, however, fail to give nonfrivolous claims of constitutional error the careful attention that they deserve.

For these reasons, we granted certiorari before judgment to determine whether the Court of Appeals erred in refusing to stay petitioner's death sentence.

A

Petitioner urges that the Court of Appeals improperly denied a stay of execution while failing to act finally on his appeal. He suggests the possibility of remanding the case to the Court of Appeals without reaching the merits of the District Court's judgment. The heart of petitioner's submission is that the Court of Appeals, unless it believes the case to be entirely frivolous, was obligated to decide the appeal on its merits in the usual course and must, in a death case, stay the execution pending such disposition. The State responds that the Court of Appeals reached and decided the merits of the issues presented in the course of denying the stay and that petitioner had ample opportunity to address the merits.

We have previously held that "if an appellant persuades an appropriate tribunal that probable cause for an appeal exists, he must then be afforded an opportunity to address the underlying merits." *Garrison* v. *Patterson*, *supra*, at 466 *(per curiam)*. See *Nowakowski* v. *Maroney*, *supra; Carafas* v.

LaVallee, supra. These decisions indicate that if a court of appeals is unable to resolve the merits of an appeal before the scheduled date of execution, the petitioner is entitled to a stay of execution to permit due consideration of the merits. But we have also held that the requirement of a decision on the merits "does not prevent the courts of appeals from adopting appropriate summary procedures for final disposition of such cases." *Garrison* v. *Patterson*, 391 U. S., at 466. See *Carafas* v. *LaVallee*, 391 U. S., at 242. In *Garrison*, after examining our prior holdings, we concluded:

> "[N]othing [in these cases] prevents the courts of appeals from considering the questions of probable cause and the merits together, and nothing said there or here necessarily requires full briefing in every instance in which a certificate is granted. We hold only that where an appeal possesses sufficient merit to warrant a certificate, the appellant must be afforded adequate opportunity to address the merits, and that if a summary procedure is adopted the appellant must be informed, by rule or otherwise, that his opportunity will be limited." 391 U. S., at 466.

We emphasized, *ibid.*, that there must be ample evidence that in disposing of the appeal, the merits have been addressed, but that nothing in the cases or the applicable rules prevents a court of appeals from adopting summary procedures in such cases.

On the surface, it is not clear whether the Fifth Circuit's recent practice of requiring a showing of some prospect of success on the merits before issuing a stay of execution, *O'Bryan* v. *Estelle*, 691 F. 2d 706, 708 (1982); *Brooks* v. *Estelle*, 697 F. 2d 586 (1982), comports with these requirements. Approving the execution of a defendant before his appeal is decided on the merits would clearly be improper under *Garrison*, *Nowakowski*, and *Carafas*. However, a practice of deciding the merits of an appeal, when possible, together with the application for a stay, is not inconsistent with our cases.

It appears clear that the Court of Appeals in this case pursued the latter course. The Court of Appeals was fully aware of our precedents and ruled that their requirements were fully satisfied. After quoting from *Garrison*, the Court of Appeals said:

> "Our actions here fall under this language. Petitioner's motion is directed solely to the merits. The parties have been also afforded an unlimited opportunity to make their contentions upon the underlying merits and oral argument. This opinion demonstrates the reasons for our decision." 697 F. 2d, at 596.

In a section of its opinion entitled "Merits of Appeal: Psychiatric Testimony on Dangerousness," the Court of Appeals then proceeded to address that issue and reject petitioner's contentions.

The course pursued by the Court of Appeals in this case was within the bounds of our prior decisions. In connection with acting on the stay, the parties were directed to file briefs and to present oral argument. In light of the Fifth Circuit's announced practice, *O'Bryan* v. *Estelle, supra; Brooks* v. *Estelle, supra,* it was clear that whether a stay would be granted depended on the probability of success on the merits. The parties addressed the merits and were given unlimited time to present argument. We do not agree that petitioner and his attorneys were prejudiced in their preparation of the appeal. The primary issue presented had been briefed and argued throughout the proceedings in the state courts and rebriefed and reargued in the District Court's habeas corpus proceeding. From the time the District Court ruled on the petition on November 9, 1982, petitioner had 71 days in which to prepare the briefs and arguments which were presented to the Fifth Circuit on January 19, 1983.

Although the Court of Appeals did not formally affirm the judgment of the District Court, there is no question that the Court of Appeals ruled on the merits of the appeal, as its concluding statements demonstrate:

> "This Court has had the benefit of the full trial court record except for a few exhibits unimportant to our considerations. We have read the arguments and materials filed by the parties. The petitioner is represented here, as he has been throughout the habeas corpus proceedings in state and federal courts, by a competent attorney experienced in this area of the law. We have heard full arguments in open court. Finding no patent substantial merit, or semblance thereof, to petitioner's constitutional objections, we must conclude and order that the motion for stay should be DENIED." 697 F. 2d, at 599–600.

It would have been advisable, once the court had addressed the merits and arrived at these conclusions, to verify the obvious by expressly affirming the judgment of the District Court, as well as to deny the stay. The court's failure to do so, however, does not conflict with *Garrison* and related cases. Indeed, in *Garrison* itself, the Court noted that "[i]n an effort to determine whether the merits had been addressed . . . this Court solicited further submissions from the parties in this case." 391 U. S., at 466, n. 2. If a formal decision on the merits were required, this inquiry would have been pointless. Moreover, the Court of Appeals cannot be faulted for not formally affirming the judgment of the District Court since this Court, over the dissent of three Justices arguing as petitioner does here, refused to stay an execution in a case where the Court of Appeals followed very similar procedures. *Brooks* v. *Estelle*, 459 U. S. 1061 (1982).[2]

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[2] In that case, we treated the application for stay as a petition for certiorari or in the alternative as a petition for certiorari before judgment. We denied the petition on either assumption.

Although the Court of Appeals moved swiftly to decide the stay, this does not mean that its treatment of the merits was cursory or inadequate. On the contrary, the court's resolution of the primary issue on appeal, the admission of psychiatric testimony on dangerousness, reflects careful consideration. For these reasons, to remand to the Court of Appeals for verification that the judgment of the District Court was affirmed would be an unwarranted exaltation of form over substance.

B

That the Court of Appeals' handling of this case was tolerable under our precedents is not to suggest that its course should be accepted as the norm or as the preferred procedure. It is a matter of public record that an increasing number of death-sentenced petitioners are entering the appellate stages of the federal habeas process. The fair and efficient consideration of these appeals requires proper procedures for the handling of applications for stays of executions and demands procedures that allow a decision on the merits of an appeal accompanying the denial of a stay. The development of these procedures is primarily a function of the courts of appeals and the rulemaking processes of the federal courts, but the following general guidelines can be set forth.

First. Congress established the requirement that a prisoner obtain a certificate of probable cause to appeal in order to prevent frivolous appeals from delaying the States' ability to impose sentences, including death sentences.[3] The primary means of separating meritorious from frivolous appeals should be the decision to grant or withhold a certificate of probable cause. It is generally agreed that "probable cause requires something more than the absence of frivolity and that the standard is a higher one than the 'good faith' requirement of § 1915." Blackmun, Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases, 43 F. R. D. 343, 352 (1967). We agree with the weight of opinion in the Courts of Appeals that a certificate of probable cause requires petitioner to make a "substantial showing of the denial of [a] federal right." *Stewart* v. *Beto*, 454 F. 2d 268, 270, n. 2 (CA5 1971), cert. denied, 406 U. S. 925 (1972). See also *Ramsey* v. *Hand*, 309 F. 2d 947, 948 (CA10 1962); *Goode* v. *Wainwright*, 670 F. 2d 941 (CA11 1982).[4] In a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause, but the severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate.

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[3] The Habeas Corpus Act of 1867, Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, the first Act empowering federal courts to issue a writ of habeas corpus for persons in state custody, imposed an automatic stay of "any proceeding against such person" pending "such proceedings or appeal" involved in determination of a prisoner's petition. *Id.*, at 386; see Rev. Stat. § 766. This provision required a stay of execution pending disposition of an appeal in capital cases. *Rogers* v. *Peck*, 199 U. S. 425, 436 (1905); *Lambert* v. *Barrett*, 159 U. S. 660, 662 (1895). In 1908, concerned with the increasing number of frivolous habeas corpus petitions challenging capital sentences which delayed execution pending completion of the appellate process, Con-

Second. When a certificate of probable cause is issued by the district court, as it was in this case, or later by the court of appeals, petitioner must then be afforded an opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal. Accordingly, a court of appeals, where necessary to prevent the case from becoming

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gress inserted the requirement that a prisoner first obtain a certificate of probable cause to appeal before being entitled to do so. Act of Mar. 10, 1908, ch. 76, 35 Stat. 40. See H. R. Rep. No. 23, 60th Cong., 1st Sess., 1-2 (1908); 42 Cong. Rec. 608-609 (1908).

[4] The following quotation cogently sums up this standard:

"In requiring a 'question of some substance', or a 'substantial showing of the denial of [a] federal right,' obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'" *Gordon* v. *Willis*, 516 F. Supp. 911, 913 (ND Ga. 1980) (citing *United States ex rel. Jones* v. *Richmond*, 245 F. 2d 234 (CA2), cert. denied, 355 U. S. 846 (1957)).

moot by the petitioner's execution, should grant a stay of execution pending disposition of an appeal when a condemned prisoner obtains a certificate of probable cause on his initial habeas appeal.

Third. As our earlier cases have indicated, a court of appeals may adopt expedited procedures in resolving the merits of habeas appeals, notwithstanding the issuance of a certificate of probable cause. If a circuit chooses to follow this course, it would be advisable to promulgate a local rule stating the manner in which such cases will be handled and informing counsel that the merits of an appeal may be decided upon the motion for a stay. Even without special procedures, it is entirely appropriate that an appeal which is "frivolous and entirely without merit" be dismissed after the hearing on a motion for a stay. See, *e. g.*, Local Rule 20, Court of Appeals for the Fifth Circuit. We caution that the issuance of a certificate of probable cause generally should indicate that an appeal is not legally frivolous, and that a court of appeals should be confident that petitioner's claim is squarely foreclosed by statute, rule, or authoritative court decision, or is lacking any factual basis in the record of the case, before dismissing it as frivolous.

If an appeal is not frivolous, a court of appeals may still choose to expedite briefing and hearing the merits of all or of selected cases in which a stay of a death sentence has been requested, provided that counsel has adequate opportunity to address the merits and knows that he is expected to do so. If appropriate notice is provided, argument on the merits may be heard at the same time the motion for a stay is considered, and the court may thereafter render a single opinion deciding both the merits and the motion, unless exigencies of time preclude a considered decision on the merits, in which case the motion for a stay must be granted. In choosing the procedures to be used, the courts should consider whether the delay that is avoided by summary procedures warrants departing from the normal, untruncated processes of appellate review. In instances where expedition of the briefing and argument schedule is not ordered, a court of appeals may nevertheless choose to advance capital cases on the docket so that the decision of these appeals is not delayed by the weight of other business.

Fourth. Second and successive federal habeas corpus petitions present a different issue. "To the extent that these involve the danger that a condemned inmate might attempt to use repeated petitions and appeals as a mere delaying tactic, the State has a quite legitimate interest in preventing such abuses of the writ." Brief for NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae* 40–41. Title 28 U. S. C. § 2254 Rule 9(b) states that "a second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief . . . [or if] the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." See *Sanders* v. *United States*, 373 U. S. 1, 18 (1963); Advisory Committee Note to Rule 9(b), 28 U. S. C., p. 273. Even where it cannot be concluded that a petition should be dismissed under Rule 9(b), it would be proper for the district court to expedite consideration of the petition. The granting of a stay should reflect the presence of substantial grounds upon which relief might be granted.

Fifth. Stays of execution are not automatic pending the filing and consideration of a petition for a writ of certiorari from this Court to the court of appeals that has denied a writ of habeas corpus. It is well established that there "'must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed.'" *White* v. *Florida*, 458 U. S. 1301, 1302 (1982) (POWELL, J., in chambers) (quoting *Times-Picayune Publishing Corp.* v.

Schulingkamp, 419 U. S. 1301, 1305 (1974) (POWELL, J., in chambers)). Applications for stays of death sentences are expected to contain the information and materials necessary to make a careful assessment of the merits of the issue and so reliably to determine whether plenary review and a stay are warranted. A stay of execution should first be sought from the court of appeals, and this Court generally places considerable weight on the decision reached by the courts of appeals in these circumstances.

III

Petitioner's merits submission is that his death sentence must be set aside because the Constitution of the United States barred the testimony of the two psychiatrists who testified against him at the punishment hearing. There are several aspects to this claim. First, it is urged that psychiatrists, individually and as a group, are incompetent to predict with an acceptable degree of reliability that a particular criminal will commit other crimes in the future and so represent a danger to the community. Second, it is said that in any event, psychiatrists should not be permitted to testify about future dangerousness in response to hypothetical questions and without having examined the defendant personally. Third, it is argued that in the particular circumstances of this case, the testimony of the psychiatrists was so unreliable that the sentence should be set aside. As indicated below, we reject each of these arguments.

A

The suggestion that no psychiatrist's testimony may be presented with respect to a defendant's future dangerousness is somewhat like asking us to disinvent the wheel. In the first place, it is contrary to our cases. If the likelihood of a defendant's committing further crimes is a constitutionally acceptable criterion for imposing the death penalty, which it is, *Jurek* v. *Texas*, 428 U. S. 262 (1976), and if it is not impossible for even a lay person sensibly to arrive at that conclusion, it makes little sense, if any, to submit that psychiatrists, out of the entire universe of persons who might have an opinion on the issue, would know so little about the subject that they should not be permitted to testify. In *Jurek*, seven Justices rejected the claim that it was impossible to predict future behavior and that dangerousness was therefore an invalid consideration in imposing the death penalty. JUSTICES Stewart, POWELL, and STEVENS responded directly to the argument, *id.*, at 274–276:

> "It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. Any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced."

Although there was only lay testimony with respect to dangerousness in *Jurek*, there was no suggestion by the Court that the testimony of doctors would be inadmissable. To the contrary, the joint opinion announcing the judgment said that the jury should be presented with all of the relevant information. Furthermore, in *Estelle* v. *Smith*, 451 U. S. 454, 473

(1981), in the face of a submission very similar to that presented in this case with respect to psychiatric testimony, we approvingly repeated the above quotation from *Jurek* and went on to say that we were in "no sense disapproving the use of psychiatric testimony bearing on future dangerousness." See also *California* v. *Ramos*, *post*, at 1005–1006, 1009–1010, n. 23; *Gregg* v. *Georgia*, 428 U. S. 153, 203–204 (1976) (joint opinion) (desirable to allow open and far-ranging argument that places as much information as possible before the jury).

Acceptance of petitioner's position that expert testimony about future dangerousness is far too unreliable to be admissible would immediately call into question those other contexts in which predictions of future behavior are constantly made. For example, in *O'Connor* v. *Donaldson*, 422 U. S. 563, 576 (1975), we held that a nondangerous mental hospital patient could not be held in confinement against his will. Later, speaking about the requirements for civil commitments, we said:

> "There may be factual issues in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists." *Addington* v. *Texas*, 441 U. S. 418, 429 (1979).

In the second place, the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party. Psychiatric testimony predicting dangerousness may be countered not only as erroneous in a particular case but also as generally so unreliable that it should be ignored. If the jury may make up its mind about future dangerousness unaided by psychiatric testimony, jurors should not be barred from hearing the views of the State's psychiatrists along with opposing views of the defendant's doctors.[5]

Third, petitioner's view mirrors the position expressed in the *amicus* brief of the American Psychiatric Association (APA). As indicated above, however, the same view was presented and rejected in *Estelle* v. *Smith.* We are no more convinced now that the view of the APA should be converted into a constitutional rule barring an entire category of expert testimony.[6] We are not persuaded that such testimony is almost entirely unreliable and that the factfinder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings.

The *amicus* does not suggest that there are not other views held by members of the Association or of the profession generally. Indeed, as this case and others indicate, there are those doctors who are quite willing to testify at the sentencing hearing, who think, and will say, that they know what they are talking about, and who expressly disagree with the Association's point of view.[7] Furthermore, their qualifications as experts are regularly accepted by the courts. If they are so obviously wrong and should be discredited, there should be no insuperable problem in doing so by calling

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[5] In this case, no evidence was offered by petitioner at trial to contradict the testimony of Doctors Holbrook and Grigson. Nor is there a contention that, despite petitioner's claim of indigence, the court refused to provide an expert for petitioner. In cases of indigency, Texas law provides for the payment of $500 for "expenses incurred for purposes of investigation and expert testimony." Tex. Code Crim. Proc. Ann., Art. 26.05(d) (Vernon Supp. 1982).

[6] The federal cases cited in JUSTICE BLACKMUN's dissent as rejecting "scientific proof," *post*, at 931, n. 9, are not constitutional decisions, but decisions of federal evidence law. The question before us is whether the Constitution forbids exposing the jury or judge in a state criminal trial to the opinions of psychiatrists about an issue that JUSTICE BLACKMUN's dissent concedes the factfinders themselves are constitutionally competent to decide.

[7] At trial, Dr. Holbrook testified without contradiction that a psychiatrist could predict the future dangerousness of an individual, if given enough background information about the individual. Tr. of Trial (T. Tr.) 2072–2073. Dr. Grigson obviously held a similar view. See *id.*, at 2110, 2134. At the District Court hearing on the habeas petition, the State called two expert witnesses, Dr. George Parker, a psychologist, and Dr. Richard

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Koons, a psychiatrist. Both of these doctors agreed that accurate predictions of future dangerousness can be made if enough information is provided; furthermore, they both deemed it highly likely that an individual fitting the characteristics of the one in the Barefoot hypothetical would commit future acts of violence. Tr. of Hearing (H. Tr.) 183–248.

Although Barefoot did not present any expert testimony at his trial, at the habeas hearing he called Dr. Fred Fason, a psychiatrist, and Dr. Wendell Dickerson, a psychologist. Dr. Fason did not dwell on the general ability of mental health professionals to predict future dangerousness. Instead, for the most part, he merely criticized the giving of a diagnosis based upon a hypothetical question, without an actual examination. He conceded that, if a medical student described a patient in the terms of the Barefoot hypothetical, his "highest order of suspicion," to the degree of 90%, would be that the patient had a sociopathic personality. *Id.*, at 22. He insisted, however, that this was only an "initial impression," and that no doctor should give a firm "diagnosis" without a full examination and testing. *Id.*, at 22, 29–30, 36. Dr. Dickerson, petitioner's other expert, was the only person to testify who suggested that no reliable psychiatric predictions of dangerousness could ever be made.

We are aware that many mental health professionals have questioned the usefulness of psychiatric predictions of future dangerousness in light of studies indicating that such predictions are often inaccurate. For example, at the habeas hearing, Dr. Dickerson, one of petitioner's expert witnesses, testified that psychiatric predictions of future dangerousness were wrong two out of three times. *Id.*, at 97, 108. He conceded, however, that, despite the high error rate, one "excellently done" study had shown "some predictive validity for predicting violence." *Id.*, at 96, 97. Dr. John Monahan, upon whom one of the State's experts relied as "the leading thinker on this issue," *id.*, at 195, concluded that "the 'best' clinical research currently in existence indicates that *psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior over a several-year period among institutionalized populations that had both committed violence in the past . . . and who were diagnosed as mentally ill.*" J. Monahan, The Clinical Prediction of Violent Behavior 47–49 (1981) (emphasis in original). However, although Dr. Monahan originally believed that it was impossible to predict violent behavior, by the time he had completed his monograph, he felt that "there may be circumstances in which prediction is both empirically possible and ethically members of the Association who are of that view and who confidently assert that opinion in their *amicus* brief. Neither petitioner nor the Association suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time. Yet the submission is that this category of testimony should be excised entirely from all trials. We are unconvinced, however, at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case.

We are unaware of and have not been cited to any case, federal or state, that has adopted the categorical views of the Association.[8] Certainly it was presented and rejected at every

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appropriate," and he hoped that his work would improve the appropriateness and accuracy of clinical predictions. *Id.*, at v.

All of these professional doubts about the usefulness of psychiatric predictions can be called to the attention of the jury. Petitioner's entire argument, as well as that of JUSTICE BLACKMUN's dissent, is founded on the premise that a jury will not be able to separate the wheat from the chaff. We do not share in this low evaluation of the adversary process.

[8] Petitioner relies on *People* v. *Murtishaw*, 29 Cal. 3d 733, 631 P. 2d 446 (1981). There the California Supreme Court held that in light of the general unreliability of such testimony, admitting medical testimony concerning future dangerousness was error in the context of a sentencing proceeding under the California capital punishment statutes. The court observed that "the testimony of [the psychiatrist was] not relevant to any of the listed factors" which the jury was to consider in deciding whether to impose the death penalty. *Id.*, at 771–772, 631 P. 2d, at 469. The court distinguished cases, however, where "the trier of fact is required by statute to determine whether a person is 'dangerous,'" in which event "expert prediction, unreliable though it may be, is often the only evidence available to assist the trier of fact." *Ibid.* Furthermore, the court acknowledged that "despite the recognized general unreliability of predictions concerning future violence, it may be possible for a party in a particular case to show that a reliable prediction is possible. . . . A reliable prediction might also be conceivable if the defendant had exhibited a long-continued pattern of criminal violence such that any knowledgeable psychiatrist would anticipate future violence." *Id.*, at 774, 631 P. 2d, at 470. Finally, we note

stage of the present proceeding. After listening to the two schools of thought testify not only generally but also about the petitioner and his criminal record, the District Court found:

> "The majority of psychiatric experts agree that where there is a pattern of repetitive assaultive and violent conduct, the accuracy of psychiatric predictions of future dangerousness dramatically rises. The accuracy of this conclusion is reaffirmed by the expert medical testimony in this case at the evidentiary hearing. . . . It would appear that Petitioner's complaint is not the diagnosis and prediction made by Drs. Holbrook and Grigson at the punishment phase of his trial, but that Dr. Grigson expressed extreme certainty in his diagnosis and prediction. . . . In any event, the differences among the experts were quantitative, not qualitative. The differences in opinion go to the weight [of the evidence] and not the admissibility of such testimony. . . . Such disputes are within the province of the jury to resolve. Indeed, it is a fundamental premise of our entire system of criminal jurisprudence that the purpose of the jury is to sort out the true testimony from the false, the important matters from the unimportant matters, and, when called upon to do so, to give greater credence to one party's expert witnesses than another's. Such matters occur routinely in the American judicial system, both civil and criminal." App. 13–14 (footnote omitted).

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that the court did not in any way indicate that its holding was based on constitutional grounds.

Petitioner also relies on *White* v. *Estelle*, 554 F. Supp. 851 (SD Tex. 1982). The court in that case did no more than express "serious reservations" about the use of psychiatric predictions based on hypotheticals in instances where the doctor has had no previous contact with the defendant. *Id.*, at 858. The actual holding of the case, which is totally irrelevant to the issues here, was that the testimony of a doctor who *had* interviewed the defendant should have been excluded because, prior to the interview, the defendant had not been given *Miranda* warnings or an opportunity to consult with his attorney, as required by *Estelle* v. *Smith*, 451 U. S. 454 (1981).

We agree with the District Court, as well as with the Court of Appeals' judges who dealt with the merits of the issue and agreed with the District Court in this respect.

B

Whatever the decision may be about the use of psychiatric testimony, in general, on the issue of future dangerousness, petitioner urges that such testimony must be based on personal examination of the defendant and may not be given in response to hypothetical questions. We disagree. Expert testimony, whether in the form of an opinion based on hypothetical questions or otherwise, is commonly admitted as evidence where it might help the factfinder do its assigned job. As the Court said long ago in *Spring Co.* v. *Edgar*, 99 U. S. 645, 657 (1879):

> "Men who have made questions of skill or science the object of their particular study, says Phillips, are competent to give their opinions in evidence. Such opinions ought, in general, to be deduced from facts that are not disputed, or from facts given in evidence; but the author proceeds to say that they need not be founded upon their own personal knowledge of such facts, but may be founded upon the statement of facts proved in the case. Medical men, for example, may give their opinions not only as to the state of a patient they may have visited, or as to the cause of the death of a person whose body they have examined, or as to the nature of the instruments which caused the wounds they have examined, but also in cases where they have not themselves seen the patient, and have only heard the symptoms and particulars of his state detailed by other witnesses at the trial. Judicial tribunals have in many instances held that medical works are not admissible, but they everywhere hold that men skilled in science, art, or particular trades may give their opinions as witnesses in matters pertaining to their professional calling."

See also *Dexter* v. *Hall*, 15 Wall. 9, 26–27 (1873); *Forsyth* v. *Doolittle*, 120 U. S. 73, 78 (1887); *Bram* v. *United States*, 168 U. S. 532, 568–569 (1897).

Today, in the federal system, Federal Rules of Evidence 702–706 provide for the testimony of experts. The Advisory Committee Notes touch on the particular objections to hypothetical questions, but none of these caveats lends any support to petitioner's constitutional arguments. Furthermore, the Texas Court of Criminal Appeals could find no fault with the mode of examining the two psychiatrists under Texas law:

> "The trial court did not err by permitting the doctors to testify on the basis of the hypothetical question. The use of hypothetical questions in the examination of expert witnesses is a well-established practice. 2 C. McCormick and R. Ray, Texas Evidence, § 1402 (2d ed. 1956). That the experts had not examined appellant went to the weight of their testimony, not to its admissibility." 596 S. W. 2d, at 887.

Like the Court of Criminal Appeals, the District Court, and the Court of Appeals, we reject petitioner's constitutional arguments against the use of hypothetical questions. Although cases such as this involve the death penalty, we perceive no constitutional barrier to applying the ordinary rules of evidence governing the use of expert testimony.

C

As we understand petitioner, he contends that even if the use of hypothetical questions in predicting future dangerousness is acceptable as a general rule, the use made of them in his case violated his right to due process of law. For example, petitioner insists that the doctors should not have been permitted to give an opinion on the ultimate issue before the jury, particularly when the hypothetical questions were phrased in terms of petitioner's own conduct;[9] that the hypothetical questions referred to controverted facts;[10] and that the answers to the questions were so positive as to be assertions of fact and not opinion.[11] These claims of misuse of the hypothetical questions, as well as others, were rejected by the Texas courts, and neither the District Court nor the Court of Appeals found any constitutional infirmity in the application of the Texas Rules of Evidence in this particular case. We agree.

IV

In sum, we affirm the judgment of the District Court. There is no doubt that the psychiatric testimony increased the likelihood that petitioner would be sentenced to death, but this fact does not make that evidence inadmissible, any more than it would with respect to other relevant evidence against any defendant in a criminal case. At bottom, to agree with petitioner's basic position would seriously undermine and in effect overrule *Jurek* v. *Texas*, 428 U. S. 262 (1976). Petitioner conceded as much at oral argument. Tr. of Oral Arg. 23–25. We are not inclined, however, to overturn the decision in that case.

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[9] There is support for this view in our cases, *United States* v. *Spaulding*, 293 U. S. 498, 506 (1935), but it does not appear from what the Court there said that the rule was rooted in the Constitution. In any event, we note that the Advisory Committee Notes to Rule 704 of the Federal Rules of Evidence state as follows:

"The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called 'ultimate issue' rule is abolished by the instant rule." 28 U. S. C. App., p. 571.

[10] Nothing prevented petitioner from propounding a hypothetical to the doctors based on his own version of the facts. On cross-examination, both Drs. Holbrook and Grigson readily admitted that their opinions might change if some of the assumptions in the State's hypothetical were not true. T. Tr. 2104, 2132–2133.

[11] The more certain a State's expert is about his prediction, the easier it is for the defendant to impeach him. For example, in response to Dr. Grigson's assertion that he was "100% sure" that an individual with the characteristics of the one in the hypothetical would commit acts of violence in the future, Dr. Fason testified at the habeas hearing that if a doctor claimed to be 100% sure of something without examining the patient, "we would kick him off the staff of the hospital for his arrogance." H. Tr. 48. Similar testimony could have been presented at Barefoot's trial, but was not.

The judgment of the District Court is

Affirmed.

JUSTICE STEVENS, concurring in the judgment.

For the reasons stated in Parts I and II of JUSTICE MARSHALL's dissenting opinion, I agree that the Court of Appeals made a serious procedural error in this case. Nevertheless, since this Court has now reviewed the merits of petitioner's appeal, and since I agree with the ultimate conclusion that the judgment of the District Court must be affirmed, I join the Court's judgment.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I cannot subscribe to the Court's conclusion that the procedure followed by the Court of Appeals in this case was "not inconsistent with our cases." *Ante*, at 890. Nor can I accept the notion that it would be proper for a court of appeals to adopt special "summary procedures" for capital cases. *Ante*, at 894. On the merits, I would vacate petitioner's death sentence.

I

I wholeheartedly agree that when a state prisoner has obtained a certificate of probable cause to appeal from the denial of a petition for a writ of habeas corpus, he "must then be afforded an opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal." *Ante*, at 893. A prisoner who has made the showing necessary to obtain a certificate of probable cause has satisfied the only condition that Congress has placed on the right to appeal in habeas corpus cases.[1] We have repeatedly held that once a certificate of probable cause has been granted, an appeal must be "duly considered"[2] and "disposed of on the merits"[3] by the court of appeals "in accord with its ordinary procedure."[4]

I likewise agree that "[a]pproving the execution of a defendant before his appeal is decided on the merits would clearly be improper," and that "a court of appeals, where necessary to prevent the case from becoming moot by the petitioner's execution, should grant a stay of execution pending disposition of [his] appeal." *Ante*, at 889, 893–894. A prisoner's right to appeal would be meaningless if the State were allowed to execute him before his appeal could be considered and decided. Although the question had not been decided by this Court until today, with the exception of the Fifth Circuit's rulings in this case and in *Brooks* v. *Estelle*, 697 F. 2d 586, stay and cert. before judgment denied, 459 U. S. 1061 (1982),[5] the Courts of Appeals have consistently held that a stay of execution must be granted unless it is clear that the prisoner's appeal is entirely frivolous. See, *e. g.*, *Goode* v. *Wainwright*, 670 F. 2d 941, 942 (CA11 1982); *Shaw* v. *Martin*, 613 F. 2d 487, 492 (CA4 1980) (Phillips, J.); *United States ex rel. DeVita* v. *McCorkle*, 214 F. 2d 823 (CA3 1954); *Fouquette* v. *Bernard*, 198 F. 2d 96, 97 (CA9 1952) (Denman, C. J.).[6] This rule reflects a recognition of the simple fact that "[i]n the very nature of proceedings on a motion for stay of execution, the limited record coupled with the time constraints . . . preclude any fine-tuned inquiry into the actual merits." *Shaw* v. *Martin*, *supra*, at 492.

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[1] Title 28 U. S. C. § 2253 provides that "[i]n a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had," if the petitioner obtains a certificate of probable cause from "the justice or judge who rendered the order or a circuit justice or judge."

[2] *Carafas* v. *LaVallee*, 391 U. S. 234, 242 (1968).

[3] *Garrison* v. *Patterson*, 391 U. S. 464, 466 (1968) *(per curiam)*.

[4] *Nowakowski* v. *Maroney*, 386 U. S. 542, 543 (1967) *(per curiam)*. See generally Blackmun, Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases, 43 F. R. D. 343 (1967).

[5] While the Fifth Circuit followed a procedure in *Brooks* v. *Estelle* similar to that employed here, this Court's denial of Brooks' application for a stay and petition for certiorari before judgment does not constitute a precedent approving this procedure. Denials of certiorari never have precedential value, see, *e. g., Brown* v. *Allen*, 344 U. S. 443, 497 (1953); *Sunal* v. *Large*, 332 U. S. 174, 181 (1947); *House* v. *Mayo*, 324 U. S. 42, 48 (1945), and the denial of a stay can have no precedential value either since the Court's order did not discuss the standard that courts of appeals should apply in passing on an application for a stay pending appeal.

II

Given the Court's acceptance of these basic principles, I frankly do not understand how the Court can conclude that the Court of Appeals' treatment of this case was "tolerable." *Ante*, at 892. If, as the Court says, the Court of Appeals was "obligated to decide the merits of the appeal," *ante*, at 893, it most definitely failed to discharge that obligation, for the court never ruled on petitioner's appeal. It is simply false to say that "the Court of Appeals ruled on the merits of the appeal." *Ante*, at 891. The record plainly shows that the Court of Appeals did no such thing. It neither dismissed the appeal as frivolous nor affirmed the judgment of the District Court. The Court of Appeals made one ruling and one ruling only: it refused to stay petitioner's execution. Had this Court not granted a stay, petitioner would have been put to death without his appeal ever having been decided one way or the other.

The Court is flatly wrong in suggesting that any defect was merely technical because the Court of Appeals could have "verif[ied] the obvious by expressly affirming the judgment of the District Court" at the same time it denied a stay. *Ante,* at 891. The Court of Appeals' failure to decide petitioner's appeal was no oversight. The court simply had no authority to decide the appeal on the basis of the papers before it. In response to a question on this very point at oral argument, respondent expressly conceded that the Court of Appeals was in no position to affirm the District Court's judgment:

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[6] Until its recent rulings the Fifth Circuit also followed this approach. See *United States ex rel. Goins* v. *Sigler*, 250 F. 2d 128, 129 (1957).

It has long been the rule that a death sentence imposed by a federal court will be stayed as a matter of course if the defendant takes an appeal. See Fed. Rule Crim. Proc. 38(a)(1) ("A sentence of death shall be stayed if an appeal is taken").

> "QUESTION: Do you think [the Court of Appeals] could as well have concluded that the judgment of the District Court should be affirmed?
>
> "MR. BECKER: No, sir . . . ." Tr. of Oral. Arg. 39.

Neither the Federal Rules of Appellate Procedure, nor the local rules of the Fifth Circuit, nor any decision of the Fifth Circuit, would have authorized an affirmance prior to the filing of briefs on the merits.[7]

Nor could the Court of Appeals have dismissed petitioner's appeal as frivolous. Although Rule 20 of the local rules of the Fifth Circuit permits dismissal of a frivolous appeal, petitioner's appeal was not subject to dismissal under this Rule for the simple reason—also conceded by the State at oral argument, Tr. of Oral Arg. 32—that it was *not* frivolous.

The Court of Appeals did not, because it could not, decide petitioner's appeal. What the court decided, and all that it decided, was that the likelihood of petitioner's prevailing on the merits was insufficient to justify the delay that would result from staying his execution pending the disposition of his appeal.[8] The question before us is whether this ruling was permissible, and it cannot be avoided by erroneously assuming that the Court of Appeals could have decided petitioner's appeal at the same time it denied a stay.

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[7] See Tr. of Oral Arg. 41:

"QUESTION: [W]hy would you suggest it would be wrong for the Court of Appeals just to affirm?

"MR. BECKER: If that was their routine policy, I think they could.

"QUESTION: But it wasn't, was it?

"MR. BECKER: No, sir, it wasn't. . . ."

In the memorandum respondent filed in the Court of Appeals opposing a stay, there was no suggestion that the court was in a position to decide the appeal.

The very principles stated by the Court in Part II–B of its opinion provide the answer to this question. Once a prisoner has obtained a certificate of probable cause to appeal, "the court of appeals is obligated to decide the merits of the appeal." *Ante*, at 893. We have so held on no less than three separate occasions. See *Garrison* v. *Patterson*, 391 U. S. 464, 466 (1968) *(per curiam); Carafas* v. *LaVallee*, 391 U. S. 234, 242 (1968); *Nowakowski* v. *Maroney*, 386 U. S. 542, 543 (1967) *(per curiam)*. As the Court also recognizes, *ante*, at 893–894, a court of appeals cannot fulfill this obligation if it permits the State to execute the prisoner before his appeal is decided. "[I]f there is probable cause for the appeal it would be a mockery of federal justice to execute [the prisoner] pending its consideration." *Fouquette* v. *Bernard*, *supra*, at 97.

The Court's effort to reconcile the procedure followed by the Court of Appeals with these principles is based on an egregious misreading of *Garrison* v. *Patterson*. *Ante*, at 891. We explicitly stated in *Garrison* that "when a district court grants a certificate of probable cause the court of appeals must 'proceed to a disposition of the appeal in accord with its ordinary procedure.'" 391 U. S., at 466, quoting *Nowakowski* v. *Maroney*, *supra*, at 543. In an attempt to avoid the obvious import of this statement, the Court quotes out of context a footnote in *Garrison* in which we stated that "[i]n an effort to determine whether the merits had been addressed" we had "solicited further submissions from the parties." 391 U. S., at 466, n. 2. Even the most cursory examination of the opinion in *Garrison* shows why this footnote provides no support whatsoever for the Court's conclusion that consideration of the merits in ruling on a stay makes an actual decision on the merits of an appeal unnecessary.

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[8] In reaching this conclusion, the Court of Appeals relied on cases involving stays in ordinary civil litigation in which the denial of a stay will not result in the execution of one of the litigants before his appeal can be decided.

In *Garrison*, in contrast to this case, the Court of Appeals *did* decide the prisoner's appeal. It issued an order in which it granted a certificate of probable cause and in the next sentence affirmed the District Court's decision without explanation. *Id.*, at 465. To determine whether this was merely a *pro forma* decision unaccompanied by any real consideration of the issues, we solicited further submissions from the parties "to determine whether the merits had been addressed . . . at the unrecorded hearing" before the Court of Appeals. *Id.*, at 466, n. 2. Since the responses we received did not demonstrate that the Court of Appeals had actually considered the merits, *ibid.*, we reversed and remanded for further consideration of the appeal.

Garrison establishes that consideration of the merits is *necessary* to satisfy a court of appeals' statutory obligation. It in no way suggests, however, that consideration of the merits can ever be a *substitute* for an actual ruling on the appeal. *Garrison* held that the Court of Appeals had failed to discharge its statutory obligation even though it *did* decide the prisoner's appeal. This holding cannot be transformed into authority for the proposition that a court of appeals need not decide a prisoner's appeal at all if it considers the merits of the appeal in ruling on an interlocutory motion.

The Court offers no justification for the procedure followed by the Court of Appeals because there is none. A State has no legitimate interest in executing a prisoner before he has obtained full review of his sentence. A stay of execution pending appeal causes no harm to the State apart from the minimal burden of providing a jail cell for the prisoner for the period of time necessary to decide his appeal. By contrast, a denial of a stay on the basis of a hasty finding that the prisoner is not likely to succeed on his appeal permits the State to execute him prior to full review of a concededly substantial constitutional challenge to his sentence. If the court's hurried evaluation of the appeal proves erroneous, as is entirely possible when difficult legal issues are decided without adequate time for briefing and full consideration, the execution of the prisoner will make it impossible to undo the mistake.

Once a federal judge has decided, as the District Judge did here, that a prisoner under sentence of death has raised a substantial constitutional claim, it is a travesty of justice to permit the State to execute him before his appeal can be considered and decided. If a prisoner's statutory right to appeal means anything, a State simply cannot be allowed to kill him and thereby moot his appeal.

III

Not content with approving the precipitous procedure followed in this case, the Court also proceeds to suggest in Part II–B of its opinion that a court of appeals might properly adopt special "summary procedures" for "all or . . . selected cases in which a stay of a death sentence has been requested." *Ante*, at 894.

It is important to bear in mind that the Court's suggestion is directed at cases in which a certificate of probable cause to appeal has been granted *and* the court of appeals has concluded that the appeal is not frivolous.[9] If the prisoner had been sentenced to any punishment other than death, his appeal would therefore have been considered and decided in accord with the court of appeals' ordinary procedure. But since he has been sentenced to death, and since his scheduled date of execution is imminent, his appeal is to be decided under special truncated procedures. In short, an appeal that raises a substantial constitutional question is to be singled out for summary treatment *solely because the State has announced its intention to execute the appellant before the ordinary appellate procedure has run its course.*

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[9] I agree with the Court that an appeal may be dismissed as frivolous only if it "is squarely foreclosed by statute, rule, or authoritative court decision, or is lacking any factual basis in the record." *Ante*, at 894. I would add that in view of the frequent changes in recent years in the law governing capital cases, see, *e. g.*, *Bullington* v. *Missouri*, 451 U. S. 430 (1981) (distinguishing *Stroud* v. *United States*, 251 U. S. 15 (1919)); *Gardner* v. *Florida*, 430 U. S. 349 (1977) (distinguishing *Williams* v. *New York*, 337 U. S. 241 (1949)), the fact that an appeal challenges a holding of this Court does not make it frivolous if a plausible argument can be made that the decision in question has been called into question by later developments.

This is truly a perverse suggestion. If full briefing and argument are generally regarded as necessary to fair and careful review of a nonfrivolous appeal—and they are—there is absolutely no justification for providing fewer procedural protections solely because a man's life is at stake. Given the irreversible nature of the death penalty, it would be hard to think of any class of cases for which summary procedures would be less appropriate than capital cases presenting a substantial constitutional issue.

The difference between capital cases and other cases is "the basis of differentiation in law in diverse ways," *Williams* v. *Georgia*, 349 U. S. 375, 391 (1955) (footnote omitted), but until today it had never been suggested, so far as I know, that *fewer* safeguards are required where life is at stake than where only liberty or property is at stake. This Court has always insisted that the need for procedural safeguards is particularly great where life is at stake. Long before the Court established the right to counsel in all felony cases, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), it recognized that right in capital cases, *Powell* v. *Alabama*, 287 U. S. 45, 71–72 (1932). Time and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case. See, *e. g.*, *Bullington* v. *Missouri*, 451 U. S. 430 (1981); *Beck* v. *Alabama*, 447 U. S. 625 (1980); *Green* v. *Georgia*, 442 U. S. 95 (1979) *(per curiam)*; *Lockett* v. *Ohio*, 438 U. S. 586 (1978); *Gardner* v. *Florida*, 430 U. S. 349 (1977); *Woodson* v. *North Carolina*, 428 U. S. 280 (1976).

These decisions reflect an appreciation of the fundamental fact that

> "the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Id.*, at 305 (opinion of Stewart, POWELL, and STEVENS, JJ.) (footnote omitted).

Because of this basic difference between the death penalty and all other punishments, this Court has consistently recognized that there is "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Ibid.* See *Eddings* v. *Oklahoma*, 455 U. S. 104, 117–118 (1982) (O'CONNOR, J., concurring); *Beck* v. *Alabama*, *supra*, at 637–638; *Lockett* v. *Ohio*, *supra*, at 604-605 (plurality opinion).

By suggesting that special summary procedures might be adopted solely for capital cases, the majority turns this established approach on its head. Given that its suggestion runs contrary to this Court's repeated insistence on the particular need for reliability in capital cases, one would have expected some indication of why it might conceivably be appropriate to adopt such procedures. Instead, the suggestion is offered without explanation in a conclusory paragraph. In the entire majority opinion the only hint of a possible rationale is the Court's cryptic quotation of the following statement in *Lambert* v. *Barrett*, 159 U. S. 660, 662 (1895):

> "It is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be interfered with on mere pretexts." Quoted, *ante*, at 888.

If, as the quotation of this statement suggests, the Court's approval of summary procedures rests on an assumption that appeals by prisoners under sentence of death are generally frivolous, the conclusive answer is that this assumption is contrary to both law and fact.

It is contrary to law because we are dealing here with cases in which the federal judge most familiar with the case has concluded that a substantial constitutional claim is presented and in which the court of appeals has agreed that the appeal is not frivolous. It is contrary to fact because experience shows that prisoners on death row have succeeded in an extraordinary number of their appeals. Of the 34 capital cases decided on the merits by Courts of Appeals since 1976 in which a prisoner appealed from the denial of habeas relief, the prisoner has prevailed in no fewer than 23 cases, or approximately 70% of the time.[10] In the Fifth Circuit, of the 21 capital cases in which the prisoner was the appellant, the prisoner has prevailed in 15 cases.[11] This record establishes beyond any doubt that a very large proportion of federal habeas corpus appeals by prisoners on death row are meritorious, even though they present claims that have been unsuccessful in the state courts, that this Court in its discretion has decided not to review on certiorari, and that a federal district judge has rejected.

In view of the irreversible nature of the death penalty and the extraordinary number of death sentences that have been found to suffer from some constitutional infirmity, it would be grossly improper for a court of appeals to establish special summary procedures for capital cases. The only consolation I can find in today's decision is that the primary responsibility for selecting the appropriate procedures for these appeals lies, as the Court itself points out, *ante*, at 892, with the courts of appeals. Cf. *In re Burwell*, 350 U. S. 521, 522 (1956) *(per curiam)*. Notwithstanding the profoundly disturbing attitude reflected in today's opinion, I am hopeful that few circuit judges would ever support the adoption of procedures that would afford less consideration to an appeal in which a man's life is at stake than to an appeal challenging an ordinary money judgment.

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[10] See Brief for NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae* 1e-6e.

[11] See *id.*, at 1e-4e.

IV

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, see *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman* v. *Georgia*, 408 U. S. 238, 358–369 (1972) (MARSHALL, J., concurring), I would vacate petitioner's death sentence.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join as to Parts I–IV, dissenting.

I agree with most of what JUSTICE MARSHALL has said in his dissenting opinion. I, too, dissent, but I base my conclusion also on evidentiary factors that the Court rejects with some emphasis. The Court holds that psychiatric testimony about a defendant's future dangerousness is admissible, despite the fact that such testimony is wrong two times out of three. The Court reaches this result—even in a capital case—because, it is said, the testimony is subject to cross-examination and impeachment. In the present state of psychiatric knowledge, this is too much for me. One may accept this in a routine lawsuit for money damages, but when a person's life is at stake—no matter how heinous his offense—a requirement of greater reliability should prevail. In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's words, equates with death itself.

I

To obtain a death sentence in Texas, the State is required to prove beyond a reasonable doubt that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex.

Code Crim. Proc. Ann., Art. 37.071(b)(2) (Vernon 1981). As a practical matter, this prediction of future dangerousness was the only issue to be decided by Barefoot's sentencing jury.[1]

At the sentencing hearing, the State established that Barefoot had two prior convictions for drug offenses and two prior convictions for unlawful possession of firearms. None of these convictions involved acts of violence. At the guilt stage of the trial, for the limited purpose of establishing that the crime was committed in order to evade police custody, see *Barefoot* v. *State*, 596 S. W. 2d 875, 886–887 (Tex. Crim. App. 1980), cert. denied, 453 U. S. 913 (1981), the State had presented evidence that Barefoot had escaped from jail in New Mexico where he was being held on charges of statutory rape and unlawful restraint of a minor child with intent to commit sexual penetration against the child's will. The prosecution also called several character witnesses at the sentencing hearing, from towns in five States. Without mentioning particular examples of Barefoot's conduct, these witnesses testified that Barefoot's reputation for being a peaceable and law-abiding citizen was bad in their respective communities.

Last, the prosecution called Doctors Holbrook and Grigson, whose testimony extended over more than half the hearing. Neither had examined Barefoot or requested the opportunity to examine him. In the presence of the jury, and over defense counsel's objection, each was qualified as an expert psychiatrist witness. Doctor Holbrook detailed at length his training and experience as a psychiatrist, which included a position as chief of psychiatric services at the Texas

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[1] It appears that every person convicted of capital murder in Texas will satisfy the other requirement relevant to Barefoot's sentence, that "the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result," Tex. Code Crim. Proc. Ann., Art. 37.071(b)(1) (Vernon 1981), because a capital murder conviction requires a finding that the defendant "intentionally or knowingly cause[d] the death of an individual," see Tex. Penal Code Ann. § 19.02(a)(1) (Vernon 1974); see also § 19.03(a).

Department of Corrections. He explained that he had previously performed many "criminal evaluations," Trial Tr. 2069, and that he subsequently took the post at the Department of Corrections to observe the subjects of these evaluations so that he could "be certain those opinions that [he] had were accurate at the time of trial and pretrial." *Id.*, at 2070. He then informed the jury that it was "within [his] *capacity as a doctor of psychiatry* to predict the future dangerousness of an individual within a *reasonable medical certainty*," *id.*, at 2072 (emphasis supplied), and that he could give "*an expert medical opinion* that would be *within reasonable psychiatric certainty* as to whether or not that individual would be dangerous to the degree that there would be a probability that that person would commit criminal acts of violence in the future that would constitute a continuing threat to society," *id.*, at 2073 (emphasis supplied).

Doctor Grigson also detailed his training and medical experience, which, he said, included examination of "between thirty and forty thousand individuals," including 8,000 charged with felonies, and at least 300 charged with murder. *Id.*, at 2109. He testified that with enough information he would be able to "give *a medical opinion within reasonable psychiatric certainty* as to the psychological or psychiatric makeup of an individual," *id.*, at 2110 (emphasis supplied), and that this skill was "particular to the field of psychiatry and not to the average layman." *Id.*, at 2111.

Each psychiatrist then was given an extended hypothetical question asking him to assume as true about Barefoot the four prior convictions for nonviolent offenses, the bad reputation for being law-abiding in various communities, the New Mexico escape, the events surrounding the murder for which he was on trial and, in Doctor Grigson's case, the New Mexico arrest. On the basis of the hypothetical question, Doctor Holbrook diagnosed Barefoot "within a reasonable psychiatr[ic] certainty," as a "criminal sociopath." *Id.*, at 2097. He testified that he knew of no treatment that could change this condition, and that the condition would not change for the better but "may become accelerated" in the next few years. *Id.*, at 2100. Finally, Doctor Holbrook testified that, "within reasonable psychiatric certainty," there was "a probability that the Thomas A. Barefoot in that hypothetical will commit criminal acts of violence in the future that would constitute a continuing threat to society," and that his opinion would not change if the "society" at issue was that within Texas prisons rather than society outside prison. *Id.*, at 2100–2101.

Doctor Grigson then testified that, on the basis of the hypothetical question, he could diagnose Barefoot "within reasonable psychiatric certainty" as an individual with "a fairly classical, typical, sociopathic personality disorder." *Id.*, at 2127–2128. He placed Barefoot in the "most severe category" of sociopaths (on a scale of one to ten, Barefoot was "above ten"), and stated that there was no known cure for the condition. *Id.*, at 2129. Finally, Doctor Grigson testified that whether Barefoot was in society at large or in a prison society there was a "*one hundred percent and absolute*" chance that Barefoot would commit future acts of criminal violence that would constitute a continuing threat to society. *Id.*, at 2131 (emphasis supplied).

On cross-examination, defense counsel questioned the psychiatrists about studies demonstrating that psychiatrists' predictions of future dangerousness are inherently unreliable. Doctor Holbrook indicated his familiarity with many of these studies but stated that he disagreed with their conclusions. Doctor Grigson stated that he was not familiar with most of these studies, and that their conclusions were accepted by only a "small minority group" of psychiatrists—"[i]t's not the American Psychiatric Association that believes that." *Id.*, at 2134.

After an hour of deliberation, the jury answered "yes" to the two statutory questions, and Thomas Barefoot was sentenced to death.

II

A

The American Psychiatric Association (APA), participating in this case as *amicus curiae*, informs us that "[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession." Brief for American Psychiatric Association as *Amicus Curiae* 12 (APA Brief). The APA's best estimate is that *two out of three* predictions of long-term future violence made by psychiatrists are wrong. *Id.*, at 9, 13. The Court does not dispute this proposition, see *ante*, at 899–901, n. 7, and indeed it could not do so; the evidence is overwhelming. For example, the APA's Draft Report of the Task Force on the Role of Psychiatry in the Sentencing Process (1983) (Draft Report) states that "[c]onsiderable evidence has been accumulated by now to demonstrate that long-term prediction by psychiatrists of future violence is an extremely inaccurate process." *Id.*, at 29. John Monahan, recognized as "the leading thinker on this issue" even by the State's expert witness at Barefoot's federal habeas corpus hearing, Hearing Tr. 195, concludes that "the 'best' clinical research currently in existence indicates that psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior," even among populations of individuals who are mentally ill and have committed violence in the past. J. Monahan, The Clinical Prediction of Violent Behavior 47–49 (1981) (emphasis deleted) (J. Monahan, Clinical Prediction); see also *id.*, at 6–7, 44–50. Another study has found it impossible to identify any subclass of offenders "whose members have a greater-than-even chance of engaging again in an assaultive act." Wenk, Robison, & Smith, Can Violence Be Predicted?, 18 Crime & Delinquency 393, 394 (1972). Yet another commentator observes: "In general, mental health professionals . . . are more likely to be wrong than right when they predict legally relevant behavior. When predicting violence, dangerousness, and suicide, they are far more likely to be wrong than right." Morse, Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law, 51 S. Cal. L. Rev. 527, 600 (1978) (Morse, Analysis of Mental Health Law). Neither the Court nor the State of Texas has cited a single reputable scientific source contradicting the unanimous conclusion of professionals in this field that psychiatric predictions of long-term future violence are wrong more often than they are right.[2]

The APA also concludes, see APA Brief 9–16, as do researchers that have studied the issue,[3] that psychiatrists simply have no expertise in predicting long-term future dangerousness. A layman with access to relevant statistics can do at least as well and possibly better; psychiatric training is not relevant to the factors that validly can be employed to make such predictions, and psychiatrists consistently err on the side of overpredicting violence.[4] Thus, while Doctors Grigson and Holbrook were presented by the State and by self-proclamation as experts at predicting future dangerousness, the scientific literature makes crystal clear that they had no expertise whatever. Despite their claims that they were able to predict Barefoot's future behavior "within reasonable psychiatric certainty," or to a "one hundred percent and absolute" certainty, there was in fact no more than a one in three chance that they were correct.[5]

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[2] Among the many other studies reaching this conclusion are APA Task Force Report, Clinical Aspects of the Violent Individual 28 (1974) (90% error rate "[u]nfortunately . . . is the state of the art") (APA, Clinical Aspects); Steadman & Morrissey, The Statistical Prediction of Violent Behavior, 5 Law & Human Behavior 263, 271–273 (1981); Dix, Expert Prediction Testimony in Capital Sentencing: Evidentiary and Constitutional Considerations, 19 Am. Crim. L. Rev. 1, 16 (1981); Schwitzgebel, Prediction of Dangerousness and Its Implications for Treatment, in W. Curran, A. McGarry, & C. Petty, Modern Legal Medicine, Psychiatry, and Forensic Science 783, 784–786 (1980); Cocozza & Steadman, Prediction in Psychiatry: An Example of Misplaced Confidence in Experts, 25 Soc. Probs. 265, 272–273 (1978); Report of the (American Psychological Association's) Task Force on the Role of Psychology in the Criminal Justice System, 33 Am. Psychologist 1099, 1110 (1978); Steadman & Cocozza, Psychiatry, Dangerousness and the Repetitively Violent Offender, 69 J. Crim. L. & Criminology 226, 227, 230 (1978); Cocozza & Steadman, The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence, 29 Rutgers L. Rev. 1084, 1101 (1976); Diamond, The Psychiatric Prediction of Dangerousness, 123 U. Pa. L. Rev. 439, 451–452 (1974); Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Calif. L. Rev. 693, 711–716 (1974). A relatively early study making this point is Rome, Identification of the Dangerous Offender, 42 F. R. D. 185 (1968).

[3] See, *e. g.*, APA, Clinical Aspects 28; 1 J. Ziskin, Coping with Psychiatric and Psychological Testimony 11, 19 (3d ed. 1981); Steadman & Morrissey, *supra* n. 2, at 264; Morse, Analysis of Mental Health Law, 51 S. Cal. L. Rev., at 599–600, 619–622; Cocozza & Steadman, *supra* n. 2, 25 Soc. Probs., at 274–275; Cocozza & Steadman, *supra* n. 2, 29 Rutgers L. Rev., at 1099–1100

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[4] See APA Brief 14–16; APA, Clinical Aspects 25; J. Monahan, Clinical Prediction 86; Morse, Analysis of Mental Health Law, 51 S. Cal. L. Rev., at 598–600; Steadman & Cocozza, *supra* n. 2, 69 J. Crim. L. & Criminology, at 229–230; Diamond, *supra* n. 2, at 447.

That psychiatrists actually may be less accurate predictors of future violence than laymen, Ennis & Litwack, *supra* n. 2, at 734–735, may be due to personal biases in favor of predicting violence arising from the fear of being responsible for the erroneous release of a violent individual, see J. Monahan, Clinical Prediction 13, 22–25, 86; Morse, Analysis of Mental Health Law, 51 S. Cal. L. Rev., at 598–600. It also may be due to a tendency to generalize from experiences with past offenders on bases that have no empirical relationship to future violence, see Shah, Dangerousness: A Paradigm for Exploring Some Issues in Law and Psychology, American Psychologist 224, 229–230 (Mar. 1978), a tendency that may be present in Grigson's and Holbrook's testimony. Statistical prediction is clearly more reliable than clinical prediction, J. Monahan, Clinical Prediction 82; Steadman & Morrissey, *supra* n. 2, at 272—and prediction based on statistics alone may be done by anyone, Morse, Analysis of Mental Health Law, 51 S. Cal. L. Rev., at 599–600; APA Brief 15–16.

[5] Like the District Court, App. 13, and the Court of Appeals, *id.*, at 20, the Court seeks to justify the admission of psychiatric testimony on the ground that "'[t]he majority of psychiatric experts agree that where there is a pattern of repetitive assaultive and violent conduct, the accuracy of psychiatric predictions of future dangerousness dramatically rises.'" *Ante*, at 902, quoting App. 13. The District Court correctly found that there

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It is impossible to square admission of this purportedly scientific but actually baseless testimony with the Constitution's paramount concern for reliability in capital sentencing.[6]

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is empirical evidence supporting the common-sense correlation between repetitive past violence and future violence; the APA states that "[t]he *most* that can be said about any individual is that a history of past violence increases the probability that future violence will occur." Draft Report 29 (emphasis supplied). But psychiatrists have no special insights to add to this actuarial fact, and a single violent crime cannot provide a basis for a reliable prediction of future violence. APA, Clinical Aspects 23–24; see J. Monahan, Clinical Prediction 71–72; Steadman & Cocozza, *supra* n. 2, 69 J. Crim. L. & Criminology, at 229–230.

The lower courts and this Court have sought solace in this statistical correlation without acknowledging its obvious irrelevance to the facts of this case. The District Court did not find that the State demonstrated any pattern of repetitive assault and violent conduct by Barefoot. Recognizing the importance of giving some credibility to its experts' specious prognostications, the State now claims that the "reputation" testimony adduced at the sentencing hearing "can only evince repeated, widespread acts of criminal violence." Brief for Respondent 47. This is simply absurd. There was no testimony worthy of credence that Barefoot had committed acts of violence apart from the crime for which he was being tried; there was testimony only of a bad *reputation* for peaceable and law-abiding conduct. In light of the fact that each of Barefoot's prior convictions was for a nonviolent offense, such testimony obviously could have been based on antisocial but nonviolent behavior. Neither psychiatrist informed the jury that he considered this reputation testimony to show a history of repeated acts of violence. Moreover, if the psychiatrists or the jury were to rely on such vague hearsay testimony in order to show a "pattern of repetitive assault and violent conduct," Barefoot's death sentence would rest on information that might "bear no closer relation to fact than the average rumor or item of gossip," *Gardner* v. *Florida*, 430 U. S. 349, 359 (1977), and should be invalid for that reason alone. A death sentence cannot rest on highly dubious predictions secretly based on a factual foundation of hearsay and pure conjecture. See *ibid.*

[6] Although I believe that the misleading nature of any psychiatric prediction of future violence violates due process when introduced in a capital sentencing hearing, admitting the predictions in this case—which were made without even examining the defendant—was particularly indefensi-

Death is a permissible punishment in Texas only if the jury finds beyond a reasonable doubt that there is a probability the defendant will commit future acts of criminal violence. The admission of unreliable psychiatric predictions of future violence, offered with unabashed claims of "reasonable medical certainty" or "absolute" professional reliability, creates an intolerable danger that death sentences will be imposed erroneously.

The plurality in *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976), stated:

> "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

The Court does not see fit to mention this principle today, yet it is as firmly established as any in our Eighth Amendment jurisprudence. Only two weeks ago, in *Zant* v. *Stephens*, 462 U. S. 862, 884 (1983), the Court described the need for reliability in the application of the death penalty as one of the

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ble. In the APA's words, if prediction following even an in-depth examination is inherently unreliable,

> "there is all the more reason to shun the practice of testifying without having examined the defendant at all. . . . Needless to say, responding to hypotheticals is just as fraught with the possibility of error as testifying in any other way about an individual whom one has not personally examined. Although the courts have not yet rejected the practice, psychiatrists should." Draft Report 32–33.

Such testimony is offensive not only to legal standards; the APA has declared that "[i]t is unethical for a psychiatrist to offer a professional opinion unless he/she has conducted an examination." The Principles of Medical Ethics, With Annotations Especially Applicable to Psychiatry § 7(3), p. 9 (1981); see Opinions of the Ethics Committee on the Principles of Medical Ethics, With Annotations Especially Applicable to Psychiatry, p. 27 (1983). The Court today sanctions admission in a capital sentencing hearing of "expert" medical testimony so unreliable and unprofessional that it violates the canons of medical ethics.

basic "themes . . . reiterated in our opinions discussing the procedures required by the Constitution in capital sentencing determinations." See *Eddings* v. *Oklahoma*, 455 U. S. 104, 110–112 (1982) (capital punishment must be "imposed fairly, and with reasonable consistency, or not at all"); *id.*, at 118–119 (O'CONNOR, J., concurring); *Beck* v. *Alabama*, 447 U. S. 625, 637–38, and n. 13 (1980); *Green* v. *Georgia*, 442 U. S. 95, 97 (1979); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion); *Gardner* v. *Florida*, 430 U. S. 349, 359 (1977) (plurality opinion); *id.*, at 363–364 (WHITE, J., concurring in judgment). State evidence rules notwithstanding, it is well established that, because the truth-seeking process may be unfairly skewed, due process may be violated even in a noncapital criminal case by the exclusion of evidence probative of innocence, see *Chambers* v. *Mississippi*, 410 U. S. 284 (1973), or by the admission of certain categories of unreliable and prejudicial evidence, see *Watkins* v. *Sowders*, 449 U. S. 341, 347 (1981) ("[i]t is the reliability of identification evidence that primarily determines its admissibility"); *Foster* v. *California*, 394 U. S. 440 (1969).[7] The reliability and admissibility of evidence considered by a capital sentencing factfinder is obviously of still greater constitutional concern. Cf. *Green* v. *Georgia*, 442 U. S. 95 (1979); *Gardner* v. *Florida*, 430 U. S. 349 (1977).

The danger of an unreliable death sentence created by this testimony cannot be brushed aside on the ground that the "'jury [must] have before it all possible relevant information about the individual defendant whose fate it must determine.'" *Ante*, at 897, quoting *Jurek* v. *Texas*, 428 U. S. 262, 276 (1976) (joint opinion announcing the judgment). Although committed to allowing a "wide scope of evidence" at presentence hearings, *Zant* v. *Stephens*, 462 U. S., at 886, the Court has recognized that "consideration must be given to the quality, as well as the quantity, of the information on which the sentencing [authority] may rely." *Gardner* v. *Florida*, 430 U. S., at 359. Thus, very recently, this Court reaffirmed a crucial limitation on the permissible scope of evidence: "'[s]o long as the evidence introduced . . . do[es] not *prejudice* a defendant, it is preferable not to impose restrictions.'" *Zant* v. *Stephens*, 462 U. S., at 886, quoting *Gregg* v. *Georgia*, 428 U. S. 153, 203–204 (1976) (emphasis supplied). The Court all but admits the obviously prejudicial impact of the testimony of Doctors Grigson and Holbrook; granting that their absolute claims were more likely to be wrong than right, *ante*, at 899, n. 7, 901, the Court states that "[t]here is no doubt that the psychiatric testimony increased the likelihood that petitioner would be sentenced to death," *ante*, at 905.

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[7] Cf. *Stein* v. *New York*, 346 U. S. 156, 192 (1953) (prior to application of Fifth Amendment to the States, "reliance on a coerced confession vitiate[d] a [state] conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence").

Indeed, unreliable scientific evidence is widely acknowledged to be prejudicial. The reasons for this are manifest. "The major danger of scientific evidence is its potential to mislead the jury; an aura of scientific infallibility may shroud the evidence and thus lead the jury to accept it without critical scrutiny." Giannelli, The Admissibility of Novel Scientific Evidence: *Frye* v. *United States*, a Half-Century Later, 80 Colum. L. Rev. 1197, 1237 (1980) (Giannelli, Scientific Evidence).[8] Where the public holds an exaggerated opinion of

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[8] There can be no dispute about this obvious proposition:

"Scientific evidence impresses lay jurors. They tend to assume it is more accurate and objective than lay testimony. A juror who thinks of scientific evidence visualizes instruments capable of amazingly precise measurement, of findings arrived at by dispassionate scientific tests. In short, in the mind of the typical lay juror, a scientific witness has a special aura of credibility." Imwinkelried, Evidence Law and Tactics for the Proponents of Scientific Evidence, in Scientific and Expert Evidence 33, 37 (E. Imwinkelried ed. 1981).

See 22 C. Wright & K. Graham, Federal Practice and Procedure § 5217, p. 295 (1978) ("Scientific . . . evidence has great potential for misleading the jury. The low probative worth can often be concealed in the jargon of the accuracy of scientific testimony, the prejudice is likely to be indelible. See *United States* v. *Baller*, 519 F. 2d 463, 466 (CA4), cert. denied, 423 U. S. 1019 (1975). There is little question that psychiatrists are perceived by the public as having a special expertise to predict dangerousness, a perception based on psychiatrists' study of mental disease. See J. Robitscher, The Powers of Psychiatry 187–188 (1980); Cocozza & Steadman, *supra* n. 2, 25 Soc. Probs., at 273; Morse, Analysis of Mental Health Law, 51 S. Cal. L. Rev., at 533–536. It is this perception that the State in Barefoot's case sought to exploit. Yet mental disease is not correlated with violence, see J. Monahan, Clinical Prediction 77–82; Steadman & Cocozza, *supra* n. 2, 69 J. Crim. L. & Criminology, at 230, and the stark fact is that no such expertise exists. Moreover, psychiatrists, it is said, sometimes attempt to perpetuate this illusion of expertise, Cocozza & Steadman, *supra* n. 2, 25 Soc. Probs., at 274, and Doctors Grigson and Holbrook—who purported to be able to predict future dangerousness "within reasonable psychiatric certainty," or absolutely—present extremely disturbing exam-

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some expert . . ."). This danger created by use of scientific evidence frequently has been recognized by the courts. Speaking specifically of psychiatric predictions of future dangerousness similar to those at issue, one District Court has observed that when such a prediction "is proffered by a witness bearing the title of 'Doctor,' its impact on the jury is much greater than if it were not masquerading as something it is not." *White* v. *Estelle*, 554 F. Supp. 851, 858 (SD Tex. 1982). See Note—*People* v. *Murtishaw:* Applying the *Frye* Test to Psychiatric Predictions of Dangerousness in Capital Cases, 70 Calif. L. Rev. 1069, 1076–1077 (1982). In *United States* v. *Addison*, 162 U. S. App. D. C. 199, 202, 498 F. 2d 741, 744 (1974), the court observed that scientific evidence may "assume a posture of mystic infallibility in the eyes of a jury of laymen." Another court has noted that scientific evidence "is likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi." *United States* v. *Alexander*, 526 F. 2d 161, 168 (CA8 1975). See *United States* v. *Amaral*, 488 F. 2d 1148, 1152 (CA9 1973); *United States* v. *Wilson*, 361 F. Supp. 510, 513 (Md. 1973); *People* v. *King*, 266 Cal. App. 2d 437, 461, 72 Cal. Rptr. 478, 493 (1968).

ples of this tendency. The problem is not uncommon. See Giannelli, Scientific Evidence, 80 Colum. L. Rev., at 1238.

Furthermore, as is only reasonable, the Court's concern in encouraging the introduction of a wide scope of evidence has been to ensure that *accurate* information is provided to the sentencing authority without restriction. The joint opinion announcing the judgment in *Gregg* explained the jury's need for relevant evidence in these terms:

> "If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for *accurate* information . . . to be able to impose a rational sentence in the typical criminal case, then *accurate* sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision." 428 U. S., at 190 (emphasis supplied).

See *California* v. *Ramos*, *post*, at 1004 (Court holds jury instruction permissible at sentencing hearing on ground that it "gives the jury *accurate* information") (emphasis supplied). So far as I am aware, the Court never has suggested that there is any interest in providing deceptive and inaccurate testimony to the jury.

Psychiatric predictions of future dangerousness *are not accurate;* wrong two times out of three, their probative value, and therefore any possible contribution they might make to the ascertainment of truth, is virtually nonexistent. See Cocozza & Steadman, *supra* n. 2, 29 Rutgers L. Rev., at 1101 (psychiatric testimony not sufficiently reliable to support finding that individual will be dangerous under any standard of proof). Indeed, given a psychiatrist's prediction that an individual will be dangerous, it is more likely than not that the defendant will *not* commit further violence. It is difficult to understand how the admission of such predictions can be justified as advancing the search for truth, particularly in light of their clearly prejudicial effect.

Thus, the Court's remarkable observation that "[n]either petitioner nor the [APA] suggests that psychiatrists are *always wrong* with respect to future dangerousness, *only most of the time*," *ante*, at 901 (emphasis supplied), misses the point completely, and its claim that this testimony was no more problematic than "other relevant evidence against any defendant in a criminal case," *ante*, at 905–906, is simply incredible. Surely, this Court's commitment to ensuring that death sentences are imposed reliably and reasonably requires that nonprobative and highly prejudicial testimony on the ultimate question of life or death be excluded from a capital sentencing hearing.

III

A

Despite its recognition that the testimony at issue was probably wrong and certainly prejudicial, the Court holds this testimony admissible because the Court is "unconvinced . . . that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness." *Ante*, at 901; see *ante*, at 899–901, n. 7. One can only wonder how juries are to separate valid from invalid expert opinions when the "experts" themselves are so obviously unable to do so. Indeed, the evidence suggests that juries are not effective at assessing the validity of scientific evidence. Giannelli, Scientific Evidence, 80 Colum. L. Rev., at 1239–1240, and n. 319.

There can be no question that psychiatric predictions of future violence will have an undue effect on the ultimate verdict. Even judges tend to accept psychiatrists' recommendations about a defendant's dangerousness with little regard for cross-examination or other testimony. Cocozza & Steadman, *supra* n. 2, 25 Soc. Probs., at 271 (in making involuntary commitment decisions, psychiatric predictions of future dangerousness accepted in 86.7% of cases); see Morse, Analysis of Mental Health Law, 51 S. Cal. L. Rev., at 536, n. 16, 603. There is every reason to believe that inexperienced jurors will be still less capable of "separat[ing] the wheat from the chaff," despite the Court's blithe assumption to the contrary, *ante*, at 901, n. 7. The American Bar Association has warned repeatedly that sentencing juries are particularly incapable of dealing with information relating to "the likelihood that the defendant will commit other crimes," and similar predictive judgments. ABA Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures § 1.1(b), Commentary, pp. 46–47 (App. Draft 1968); ABA Standards for Criminal Justice 18–1.1, Commentary, pp. 18·16, 18·24 to 18·25 (2d ed. 1980). Relying on the ABA's conclusion, the joint opinion announcing the judgment in *Gregg* v. *Georgia*, 428 U. S., at 192, recognized that "[s]ince the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given." But the Court in this case, in its haste to praise the jury's ability to find the truth, apparently forgets this well-known and worrisome shortcoming.

As if to suggest that petitioner's position that unreliable expert testimony should be excluded is unheard of in the law, the Court relies on the proposition that the rules of evidence generally "anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party." *Ante*, at 898. But the Court simply ignores hornbook law that, despite the availability of cross-examination and rebuttal witnesses, "opinion evidence is not admissible if the court believes that the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted." E. Cleary, McCormick on Evidence § 13, p. 31 (2d ed. 1972). Because it is feared that the jury will overestimate its probative value, polygraph evidence, for example, almost invariably is excluded from trials despite the fact that, at a conservative estimate, an experienced polygraph examiner can detect truth or deception correctly about 80 to 90 percent of the time. Ennis & Litwack, *supra* n. 2, at 736.[9] In no area is purportedly "expert" testimony admitted for the jury's consideration where it cannot be demonstrated that it is correct more often than not. "It is inconceivable that a judgment could be considered an 'expert' judgment when it is less accurate than the flip of a coin." *Id.*, at 737. The risk that a jury will be incapable of separating "scientific" myth from reality is deemed unacceptably high.[10]

B

The Constitution's mandate of reliability, with the stakes at life or death, precludes reliance on cross-examination and the opportunity to present rebuttal witnesses as an antidote for this distortion of the truth-finding process. Cross-examination is unlikely to reveal the fatuousness of psychiatric predictions because such predictions often rest, as was the case here, on psychiatric categories and intuitive clinical judgments not susceptible to cross-examination and rebuttal. Dix, *supra* n. 2, at 44. Psychiatric categories have little or no demonstrated relationship to violence, and their use often obscures the unimpressive statistical or intuitive bases for prediction. J. Monahan, Clinical Prediction 31; Cocozza & Steadman, *supra* n. 2, 25 Soc. Probs., at 274.[11] The APA particularly condemns the use of the diagnosis employed by Doctors Grigson and Holbrook in this case, that of sociopathy:

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[9] Other purportedly scientific proof has met a similar fate. See, *e. g.*, *United States* v. *Kilgus*, 571 F. 2d 508, 510 (CA9 1978) (expert testimony identifying aircraft through "forward looking infrared system" inadmissible because unreliable and not generally accepted in scientific field to which it belongs); *United States* v. *Brown*, 557 F. 2d 541, 558–559 (CA6 1977) (expert identification based on "ion microprobic analysis of human hair" not admissible because insufficiently reliable and accurate, and not accepted in its field); *United States* v. *Addison*, 162 U. S. App. D. C., at 203, 498 F. 2d, at 745 (expert identification based on voice spectrogram inadmissible because not shown reliable); *United States* v. *Hearst*, 412 F. Supp. 893, 895 (ND Cal. 1976) (identification testimony of expert in "psycholinguistics" inadmissible because not demonstrably reliable), aff'd on other grounds, 563 F. 2d 1331 (CA9 1977).

[10] The Court observes that this well-established rule is a matter of evidence law, not constitutional law. *Ante*, at 899, n. 6. But the principle requiring that capital sentencing procedures ensure reliable verdicts, see *supra*, at 923–926, which the Court ignores, and the principle that due process is violated by the introduction of certain types of seemingly conclusive, but actually unreliable, evidence, see *supra*, at 925, and n. 7, which the Court also ignores, are constitutional doctrines of long standing. The teaching of the evidence doctrine is that unreliable scientific testimony creates a serious and unjustifiable risk of an erroneous verdict, and that the adversary process at its best does not remove this risk. We should not dismiss this lesson merely by labeling the doctrine nonconstitutional; its relevance to the constitutional question before the Court could not be more certain.

> "In this area confusion reigns. The psychiatrist who is not careful can mislead the judge or jury into believing that a person has a major mental disease simply on the basis of a description of prior criminal behavior. Or a psychiatrist can mislead the court into believing that an individual is devoid of conscience on the basis of a description of criminal acts alone. . . . The profession of psychiatry has a responsibility to avoid inflicting this confusion upon the courts and to spare the defendant the harm that may result. . . . Given our uncertainty about the implications of the finding, the diagnosis of sociopathy . . . should not be used to justify or to support predictions of future conduct. There is no certainty in this area." Draft Report 30.

It is extremely unlikely that the adversary process will cut through the facade of superior knowledge. THE CHIEF JUSTICE long ago observed:

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[11] In one study, for example, the only factor statistically related to whether psychiatrists predicted that a subject would be violent in the future was the type of crime with which the subject was charged. Yet the defendant's charge was mentioned by the psychiatrists to justify their predictions in only one third of the cases. The criterion most frequently cited was "delusional or impaired thinking." Cocozza & Steadman, *supra* n. 2, 29 Rutgers L. Rev., at 1096.

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> "The very nature of the adversary system . . . complicates the use of scientific opinion evidence, particularly in the field of psychiatry. This system of partisan contention, of attack and counterattack, at its best is not ideally suited to developing an accurate portrait or profile of the human personality, especially in the area of abnormal behavior. Although under ideal conditions the adversary system can develop for a jury most of the necessary fact material for an adequate decision, such conditions are rarely achieved in the courtrooms in this country. These ideal conditions would include a highly skilled and experienced trial judge and highly skilled lawyers on both sides of the case, all of whom in addition to being well-trained in the law and in the techniques of advocacy would be sophisticated in matters of medicine, psychiatry, and psychology. It is far too rare that all three of the legal actors in the cast meet these standards." Burger, Psychiatrists, Lawyers, and the Courts, 28 Fed. Prob. 3, 6 (June 1964).

Another commentator has noted:

> "Competent cross-examination and jury instructions may be partial antidotes . . . , but they cannot be complete. Many of the cases are not truly adversarial; too few attorneys are skilled at cross-examining psychiatrists, laypersons overweigh the testimony of experts, and, in any case, unrestricted use of experts promotes the incorrect view that the questions are primarily scientific. There is, however, no antidote for the major difficulty with mental health 'experts'—that they simply are not experts . . . . In realms beyond their true expertise, the law has little special to learn from them; too often their testimony is . . . prejudicial." Morse, Analysis of Mental Health Law, 51 S. Cal. L. Rev., at 626.

See *id.*, at 535–536. See also Dix, *supra* n. 2, at 44–45; Ennis & Litwack, *supra* n. 2, at 745; Note, *supra* n. 8, 70 Calif. L. Rev., at 1079–1080; J. Robitscher, The Powers of Psychiatry 202–203 (1980).

Nor is the presentation of psychiatric witnesses on behalf of the defense likely to remove the prejudicial taint of misleading testimony by prosecution psychiatrists.[12] No reputable expert would be able to predict with confidence that the defendant will *not* be violent; at best, the witness will be able to give his opinion that all predictions of dangerousness are unreliable. Consequently, the jury will not be presented with the traditional battle of experts with opposing views on the ultimate question. Given a choice between an expert who says that he can predict with certainty that the defendant, whether confined in prison or free in society, will kill again, and an expert who says merely that no such prediction can be made, members of the jury charged by law with making the prediction surely will be tempted to opt for the expert who claims he can help them in performing their duty, and who predicts dire consequences if the defendant is not put to death.[13]

Moreover, even at best, the presentation of defense psychiatrists will convert the death sentence hearing into a battle of experts, with the Eighth Amendment's well-established requirement of individually focused sentencing a certain loser. The jury's attention inevitably will turn from an assessment of the propriety of sentencing to death the defendant before it to resolving a scientific dispute about the capabilities of psychiatrists to predict future violence. In such an atmosphere, there is every reason to believe that the jury may be distracted from its constitutional responsibility to consider "particularized mitigating factors," see *Jurek* v. *Texas*, 428 U. S., at 272, in passing on the defendant's future dangerousness. See Davis, *supra* n. 12, at 310.

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[12] For one thing, although most members of the mental health professions believe that such predictions cannot be made, defense lawyers may experience significant difficulties in locating effective rebuttal witnesses. Davis, Texas Capital Sentencing Procedures: The Role of the Jury and the Restraining Hand of the Expert, 69 J. Crim. L. & Criminology 300, 302 (1978). I presume that the Court's reasoning suggests that, were a defendant to show that he was unable, for financial or other reasons, to obtain an adequate rebuttal expert, a constitutional violation might be found.

[13] "Although jurors may treat mitigating psychiatric evidence with skepticism, they may credit psychiatric evidence demonstrating aggravation. Especially when jurors' sensibilities are offended by a crime, they may seize upon evidence of dangerousness to justify an enhanced sentence." Dix, *supra* n. 2, at 43, n. 215. Thus, the danger of jury deference to expert opinions is particularly acute in death penalty cases. Expert testimony of this sort may permit juries to avoid the difficult and emotionally

One searches the Court's opinion in vain for a plausible justification for tolerating the State's creation of this risk of an erroneous death verdict. As one Court of Appeals has observed:

> "A courtroom is not a research laboratory. The fate of a defendant . . . should not hang on his ability to successfully rebut scientific evidence which bears an 'aura of special reliability and trustworthiness,' although, in reality the witness is testifying on the basis of an unproved hypothesis . . . which has yet to gain general acceptance in its field." *United States* v. *Brown*, 557 F. 2d 541, 556 (CA6 1977).

Ultimately, when the Court knows full well that psychiatrists' predictions of dangerousness are specious, there can be no excuse for imposing on the defendant, on pain of his

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draining personal decisions concerning rational and just punishment. *Id.*, at 46. Doctor Grigson himself has noted both the superfluousness and the misleading effect of his testimony:

"'I think you could do away with the psychiatrist in these cases. Just take any man off the street, show him what the guy's done, and most of these things are so clearcut he would say the same things I do. But I think the jurors feel a little better when a psychiatrist says it—somebody that's supposed to know more than they know.'" Bloom, Killers and Shrinks, Texas Monthly 64, 68 (July 1978) (quoting Doctor Grigson).

life, the heavy burden of convincing a jury of laymen of the fraud.[14]

IV

The Court is simply wrong in claiming that psychiatric testimony respecting future dangerousness is necessarily admissible in light of *Jurek* v. *Texas*, 428 U. S. 262 (1976), or *Estelle* v. *Smith*, 451 U. S. 454 (1981). As the Court recognizes, *Jurek* involved "only lay testimony." *Ante*, at 897. Thus, it is not surprising that "there was no suggestion by the Court that the testimony of doctors would be inadmissible," *ibid.*, and it is simply irrelevant that the *Jurek* Court did not "disapprov[e]" the use of such testimony, see *Estelle* v. *Smith*, 451 U. S., at 473.

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[14] The Court is far wide of the mark in asserting that excluding psychiatric predictions of future dangerousness from capital sentencing proceedings "would immediately call into question those other contexts in which predictions of future behavior are constantly made." *Ante*, at 898. Short-term predictions of future violence, for the purpose of emergency commitment or treatment, are considerably more accurate than long-term predictions. See APA Brief 12, n. 7; Monahan, Prediction Research and the Emergency Commitment of Dangerous Mentally Ill Persons: A Reconsideration, 135 Am. J. Psychiatry 198 (1978); J. Monahan, Clinical Prediction 59–60; Schwitzgebel, *supra* n. 2, at 786. In other contexts where psychiatric predictions of future dangerousness are made, moreover, the subject will not be criminally convicted, much less put to death, as a result of predictive error. The risk of error therefore may be shifted to the defendant to some extent. See *Addington* v. *Texas*, 441 U. S. 418, 423–430 (1979). The APA, discussing civil commitment proceedings based on determinations of dangerousness, states that in light of the unreliability of psychiatric predictions, "[c]lose monitoring, frequent follow-up, and a willingness to change one's mind about treatment recommendations and dispositions for violent persons, whether within the legal system or without, is the *only* acceptable practice if the psychiatrist is to play a helpful role in these assessments of dangerousness." APA, Clinical Aspects 30 (emphasis supplied). In a capital case there will be no chance for "follow-up" or "monitoring." A subsequent change of mind brings not justice delayed, but the despair of irreversible error. See Bonnie & Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L. Rev. 427, 442–446 (1980).

In *Smith*, the psychiatric testimony at issue was given by the same Doctor Grigson who confronts us in this case, and his conclusions were disturbingly similar to those he rendered here. See *id.*, at 459–460. The APA, appearing as *amicus curiae*, argued that all psychiatric predictions of future dangerousness should be excluded from capital sentencing proceedings. The Court did not reach this issue, because it found Smith's death sentence invalid on narrower grounds: Doctor Grigson's testimony had violated Smith's Fifth and Sixth Amendment rights. *Id.*, at 473. Contrary to the Court's inexplicable assertion in this case, *ante*, at 899, *Smith* certainly did not reject the APA's position. Rather, the Court made clear that "the holding in *Jurek* was guided by recognition that the inquiry [into dangerousness] mandated by Texas law does *not* require resort to medical experts." 451 U. S., at 473 (emphasis added). If *Jurek* and *Smith* held that psychiatric predictions of future dangerousness are admissible in a capital sentencing proceeding as the Court claims, this guiding recognition would have been irrelevant.

The Court also errs in suggesting that the exclusion of psychiatrists' predictions of future dangerousness would be contrary to the logic of *Jurek*. *Jurek* merely upheld Texas' substantive decision to condition the death sentence upon proof of a probability that the defendant will commit criminal acts of violence in the future. Whether the evidence offered by the prosecution to prove that probability is so unreliable as to violate a capital defendant's rights to due process is an entirely different matter, one raising only questions of fair procedure.[15] *Jurek*'s conclusion that Texas may impose the

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[15] The Court's focus in the death penalty cases has been primarily on ensuring a fair procedure:

"In ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eli-death penalty on capital defendants who probably will commit criminal acts of violence in no way establishes that the prosecution may convince a jury that this is so by misleading or patently unreliable evidence.

Moreover, *Jurek*'s holding that the Texas death statute is not impermissibly vague does not lead ineluctably to the conclusion that psychiatric testimony is admissible. It makes sense to exclude psychiatric predictions of future violence while admitting lay testimony, see *ante*, at 896–897, because psychiatric predictions appear to come from trained mental health professionals, who purport to have special expertise. In view of the total scientific groundlessness of these predictions, psychiatric testimony is fatally misleading. See *White* v. *Estelle*, 554 F. Supp., at 858. Lay testimony, frankly based on statistical factors with demonstrated correlations to violent behavior, would not raise this substantial threat of unreliable and capricious sentencing decisions, inimical to the constitutional standards established in our cases; and such predictions are as accurate as any a psychiatrist could make. Indeed, the very basis of *Jurek*, as I understood it, was that such judgments *can* be made by laymen on the basis of lay testimony.

Our constitutional duty is to ensure that the State proves future dangerousness, if at all, in a reliable manner, one that ensures that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner* v. *Florida*, 430 U. S., at 358. Texas' choice of substantive factors does not justify loading the factfinding process against the defendant through the presentation of what is, at bottom, false testimony.

V

I would vacate petitioner's death sentence, and remand for further proceedings consistent with these views.

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gible for the death penalty." *California* v. *Ramos*, *post*, at 999 (emphasis in original).

BARCLAY *v.* FLORIDA

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 81-6908. Argued March 30, 1983—Decided July 6, 1983

Petitioner and other men, whose apparent purpose was to indiscriminately kill white persons and to start a racial war, killed a white hitchhiker in Florida. Petitioner was convicted of first-degree murder by a jury in a Florida state court, and as required by the Florida death penalty statute a separate sentencing hearing was held before the same jury, which rendered an advisory sentence recommending life imprisonment. However, the trial judge, after receiving a presentence report, sentenced petitioner to death. As required by the Florida statute, the judge made written findings of fact, including findings of the statutory aggravating circumstances that petitioner had knowingly created a great risk of death to many persons, had committed the murder while engaged in a kidnaping, had endeavored to disrupt governmental functions and law enforcement, and had been especially heinous, atrocious, and cruel. The judge also found that in addition to the statutory aggravating circumstances the petitioner's record constituted an aggravating circumstance, and ultimately concluded that there were sufficient aggravating circumstances to justify the death sentence. The judge did not find any mitigating circumstances, noting particularly that petitioner had an extensive criminal record and thus did not qualify for the statutory mitigating circumstance of having no significant history of prior criminal activity. On automatic appeal, the Florida Supreme Court affirmed, approving the trial judge's findings and concluding that the trial judge properly rejected the jury's recommendation of life imprisonment. However, the Florida Supreme Court later vacated its judgment and remanded to the trial court to give petitioner a full opportunity to rebut the information in the presentence report. After a resentencing hearing, the trial court reaffirmed the death sentence on the basis of findings that were essentially identical to its original findings, and the Florida Supreme Court again affirmed.

Held: The judgment is affirmed.

411 So. 2d 1310, affirmed.

JUSTICE REHNQUIST, joined by CHIEF JUSTICE BURGER, JUSTICE WHITE, and JUSTICE O'CONNOR, concluded:

1. Although the State concedes that under Florida law the trial judge improperly found that petitioner's criminal record was an "aggravating circumstance" because that factor was not among those established as

"aggravating circumstances" by the Florida statute, there is no merit to petitioner's challenge concerning the findings on other aggravating circumstances. Pp. 946–951.

(a) The findings as to the presence of the statutory aggravating circumstances were made by the trial court and approved by the Florida Supreme Court under Florida law, and thus this Court's review is limited to the question whether the findings were so unprincipled or arbitrary as to violate the Federal Constitution. It was not irrational or arbitrary to apply the statutory aggravating circumstances to the facts of this case. Pp. 946–947.

(b) Nor must the sentence be vacated on the ground that the trial judge, in explaining his sentencing decision, discussed the racial motive for the murder and compared it with his own Army experiences in World War II, when he saw Nazi concentration camps and their victims. The Constitution does not require that the sentencing process be transformed into a rigid and mechanical parsing of statutory aggravating factors. It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing. Pp. 948–951.

2. Although under Florida law the trial court improperly considered the petitioner's criminal record as an "aggravating circumstance," imposition of the death penalty on petitioner does not violate the Federal Constitution. Pp. 951–958.

(a) The Florida statute requires the sentencer to find at least one valid statutory aggravating circumstance before the death penalty may even be considered, and permits the trial court to admit any evidence that may be relevant to the proper sentence. Florida law requires the sentencer to balance statutory aggravating circumstances against all mitigating circumstances and does not permit nonstatutory aggravating circumstances to enter into the weighing process. However, when the trial court erroneously considers improper aggravating factors, the Florida Supreme Court applies a harmless-error analysis if the trial court properly found that there were no mitigating circumstances. Pp. 952–956.

(b) Nothing in the Federal Constitution prohibited the trial court from considering petitioner's criminal record. And under Florida law, the evidence was properly introduced to prove that the mitigating circumstance of absence of a criminal record did not exist. P. 956.

(c) There is no constitutional defect in a death sentence based on both statutory and nonstatutory aggravating circumstances, and mere errors of state law are not the concern of this Court unless they rise to the level of a denial of constitutional rights. There is no reason why the Florida Supreme Court, in applying its harmless-error analysis, cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance. What is important is an individualized determination on the basis of the character of the individual and the circumstances of the crime. Pp. 956–958.

JUSTICE STEVENS, joined by JUSTICE POWELL, stressed the importance of procedural protections that are intended to insure that the death penalty will be imposed in a consistent, rational manner. He concluded that Florida's sentencing procedure is constitutionally adequate; that the Florida rule that statutory aggravating factors must be exclusive affords greater protection than the Federal Constitution requires; that although a death sentence may not rest solely on a nonstatutory aggravating circumstance, the Constitution requires no more than one valid statutory aggravating circumstance, at least as long as none of the invalid aggravating circumstances is supported by erroneous or misleading information; that there is no merit in petitioner's contention that none of the statutory aggravating circumstances found by the trial court may be sustained under Florida law and the Federal Constitution; that the trial court did not commit reversible error of constitutional magnitude by considering nonstatutory aggravating factors; and that the Florida Supreme Court has fulfilled its constitutionally mandated responsibility of performing meaningful appellate review of death sentences. Pp. 960–974.

REHNQUIST, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C. J., and WHITE and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which POWELL, J., joined, *post*, p. 958. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 974. BLACKMUN, J., filed a dissenting opinion, *post*, p. 991.

James M. Nabrit III argued the cause for petitioner. With him on the brief were *Kenneth Vickers*, *Jack Greenberg*, *Joel Berger*, *John Charles Boger*, *Deborah Fins*, *James S. Liebman*, and *Anthony G. Amsterdam*.

Wallace E. Allbritton, Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief was *Jim Smith*, Attorney General.

JUSTICE REHNQUIST announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR joined.

The central question in this case is whether Florida may constitutionally impose the death penalty on petitioner

Elwood Barclay when one of the "aggravating circumstances" relied upon by the trial judge to support the sentence was not among those established by the Florida death penalty statute.

The facts, as found by the sentencing judge and quoted by the Florida Supreme Court, are as follows:

> "[T]he four defendants were part of a group that termed itself the 'BLACK LIBERATION ARMY' (BLA), and whose apparent sole purpose was to indiscriminately kill white persons and to start a revolution and a racial war.
>
> "The testimony showed that on the evening of June 17, 1974, Dougan, Barclay, Crittendon, Evans and William Hearn set out in a car armed with a twenty two caliber pistol and a knife with the intent to kill . . . any white person that they came upon under such advantageous circumstances that they could murder him, her or them.
>
> "That as they drove around the City of Jacksonville they made several stops and observed white persons as possible victims, but decided that the circumstances were not advantageous and that they might be observed or thwarted . . . . At one stop, Dougan wrote out a note—which was to be placed on the body of the victim ultimately chosen for death.
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> "Eventually the five men headed for Jacksonville Beach where they picked up a hitch hiker, eighteen year old, Stephen Anthony Orlando. Against his will and over his protest they drove him to an isolated trash dump, ordered him out of the car, threw him down and Barclay repeatedly stabbed him with a knife. Dougan then put his foot on Orlando's head and shot him twice—once in the cheek and once in the ear—killing him instantly.
>
> "The evidence showed that none of the defendants knew or had ever seen Orlando before they murdered

him. The note, which Dougan had previously written, was stuck to Orlando's body by the knife of the murderers. The note read:

"'Warning to the oppressive state. No longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer asleep. The revolution has begun and the oppressed will be victorious. The revolution will end when we are free. The Black Revolutionary Army. All power to the people.' . . .

. . . . .

"Subsequent to the murder the defendants Barclay and Dougan . . . made a number of tape recordings concerning the murder. These recordings were mailed to the [victim's mother] and to radio and television stations. All of the tapes contained much the same in content and intent. [The court then reproduced typical excerpts from transcripts of the tapes, which included the following:]

. . . . .

"'The reason Stephen was only shot twice in the head was because we had a jive pistol. It only shot twice and then it jammed; you can tell it must have been made in America because it wasn't worth a shit. He was stabbed in the back, in the chest and the stomach, ah, it was beautiful. You should have seen it. Ah, I enjoyed every minute of it. I loved watching the blood gush from his eyes. . . .'

"'He died in style, though, begging, begging and pleading for mercy, just as black people did when you took them and hung them to the trees, burned their houses down, threw bombs in the same church that practices the same religion that you forced on these people, my people.

"'We are everywhere; you cannot hide from us. You have told your people to get off the streets and to stay

> home. That will not help, for one night they will come home and we will be there waiting. It has been said, look for us and you cannot see us; listen for us and you cannot hear us; feel for us and you cannot touch us. These are the characteristics of an urban guerilla.'" *Barclay* v. *State*, 343 So. 2d 1266, 1267–1269 (1977).

Barclay and Dougan were convicted by a jury of first-degree murder.[1] As required by the Florida death penalty statute, Fla. Stat. § 921.141(1) (1977), a separate sentencing hearing was held before the same jury. The jury rendered advisory sentences under § 921.141(2), recommending that Dougan be sentenced to death and, by a 7 to 5 vote, that Barclay be sentenced to life imprisonment. The trial judge, after receiving a presentence report, decided to sentence both men to death. He made written findings of fact concerning aggravating and mitigating circumstances as required by § 921.141(3). App. 1–53. The trial judge found that several of the aggravating circumstances set out in the statute were present. He found that Barclay had knowingly created a great risk of death to many persons, § 921.141(5)(c), had committed the murder while engaged in a kidnaping, § 921.141(5)(d), had endeavored to disrupt governmental functions and law enforcement, § 921.141(5)(g), and had been especially heinous, atrocious, or cruel. § 921.141(5)(h). See 343 So. 2d, at 1271.

The trial judge did not find any mitigating circumstances. He noted in particular that Barclay had an extensive criminal record, and therefore did not qualify for the mitigating circumstance of having no significant history of prior criminal activity. § 921.141(6)(a). He found that Barclay's record constituted an aggravating, rather than a mitigating, circumstance. 343 So. 2d, at 1270, and n. 2. The trial judge also noted that the aggravating circumstance of § 921.141(5)(a) ("The capital felony was committed by a convict under sentence of imprisonment") was not present, but restated Barclay's criminal record and again found it to be an aggravating circumstance. App. 33–34. He made a similar finding as to the aggravating circumstance of § 921.141(5)(b) ("The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person"). Barclay had been convicted of breaking and entering with intent to commit the felony of grand larceny, but the trial judge did not know whether it involved the use or threat of violence. He pointed out that crimes such as this often involve the use or threat of violence, and stated that "there are more aggravating than mitigating circumstances." *Id.*, at 34–35.

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[1] Evans and Crittendon, who did not actually kill Orlando, were convicted of second-degree murder and sentenced to 199 years in prison. Hearn pleaded guilty to second-degree murder and testified for the prosecution.

The trial judge concluded that "[T]HERE ARE SUFFICIENT AND GREAT AGGRAVATING CIRCUMSTANCES WHICH EXIST TO JUSTIFY THE SENTENCE OF DEATH AS TO BOTH DEFENDANTS." *Id.*, at 48. He therefore rejected part of the jury's recommendation, and sentenced Barclay as well as Dougan to death.

On the automatic appeal provided by Fla. Stat. § 921.141 (4) (1977), the Florida Supreme Court affirmed. It approved the findings of the trial judge and his decision to reject the jury's recommendation that Barclay be sentenced to life imprisonment. It concluded that "[t]his is a case . . . where the jury did not act reasonably in the imposition of sentence, and the trial judge properly rejected one of their recommendations." 343 So. 2d, at 1271 (footnotes omitted).

This Court denied a petition for a writ of certiorari. 439 U. S. 892 (1978). However, the Florida Supreme Court later vacated its judgment, *sua sponte*, in light of our decision in *Gardner* v. *Florida*, 430 U. S. 349 (1977), and remanded to the trial court to give Barclay a full opportunity to rebut the information in the presentence report that was prepared for the trial judge. The trial court held a resentencing hearing, and reaffirmed the death sentence on the basis of findings that are essentially identical to its original findings. App. 82–141. On appeal, the Florida Supreme Court again affirmed, holding that Barclay had not been denied any rights under *Gardner.* 411 So. 2d 1310 (1981). Rehearing was denied by an equally divided court. *Ibid.*

I

Barclay has raised numerous objections to the trial judge's findings. The Florida courts declined to reconsider these arguments in the resentencing proceedings. The resentencing hearing was limited to ensuring that Barclay received all the rights to which he was entitled under *Gardner.* The Florida Supreme Court stated that it had "previously analyzed," 411 So. 2d, at 1311, Barclay's arguments, which were directed "against the findings previously reviewed here and affirmed," and declined to "abrogate the 'law of the case'" on these questions. *Id.*, at 1310. Since the Florida Supreme Court held that it had considered Barclay's claims in his first appeal, and simply refused to reconsider its previous decision in the second appeal, those claims are properly before us. *Reece* v. *Georgia*, 350 U. S. 85, 86–87 (1955).

A

Barclay argues that the trial judge improperly found that his criminal record was an "aggravating circumstance." The State concedes that this is correct: Florida law plainly provides that a defendant's prior criminal record is not a proper "aggravating circumstance." *Mikenas* v. *State*, 367 So. 2d 606, 610 (Fla. 1978).

B

Barclay also argues that the trial judge improperly found the "under sentence of imprisonment" and "previously been convicted of a [violent] felony" aggravating circumstances. The Florida Supreme Court, however, construed the trial judge's opinion as finding that these aggravating circumstances "essentially had no relevance here." 343 So. 2d, at

1271 (footnote omitted). We see no reason to disturb that conclusion. The trial judge plainly stated that Barclay "was not under sentence of imprisonment." App. 120. The trial judge also stated in the same paragraph that Barclay's criminal record "is an aggravating circumstance," *id.*, at 121, but this is simply a repetition of the error noted above.

Barclay also challenges the findings on several other aggravating circumstances. He claims that the trial court improperly found that he caused a great risk of death to many people,[2] that the murder was committed during a kidnaping, that the murder was committed to disrupt the lawful exercise of a governmental function or the enforcement of the laws,[3] and that the murder was especially heinous, atrocious, or cruel.[4] All of these findings were made by the trial court and approved by the Florida Supreme Court under Florida law. Our review of these findings is limited to the question whether they are so unprincipled or arbitrary as to somehow violate the United States Constitution. We think they were not. It was not irrational or arbitrary to apply these aggravating circumstances to the facts of this case.[5]

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[2] The Florida Supreme Court stated:

"The trial judge noted five aborted attempts to select a victim from the streets of Jacksonville before Stephen Orlando was chosen, plus the taped threat made to white Jacksonville citizens that a race war had begun and none would be safe." 343 So. 2d, at 1271, n. 4.

[3] The Florida Supreme Court stated:

"The basis for this finding was the judge's observation that the notion of a race war essentially threatened the foundations of American society." *Id.*, at 1271, n. 5.

[4] The Florida Supreme Court noted that the tape recordings petitioner and Dougan made "explained how Stephen Orlando had begged for his life while being beaten and stabbed before Dougan 'executed' him with two pistol shots in the head." *Id.*, at 1271, n. 6.

[5] The differences between this case and *Godfrey* v. *Georgia*, 446 U. S. 420 (1980), are readily apparent. Godfrey killed his wife and his mother-in-law with a single shotgun blast each. Each died instantly. There was no torture or aggravated battery. The state court nonetheless found that

C

Barclay also contends that his sentence must be vacated because the trial judge, in explaining his sentencing decision, discussed the racial motive for the murder and compared it with his own experiences in the Army in World War II, when he saw Nazi concentration camps and their victims.[6] Bar-

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the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code § 27-2534.1(b)(7) (1978). It found no other aggravating circumstances. We concluded that, on the facts of the case, such a finding could only have resulted from a "standardless and unchannelled" decision based on "the uncontrolled discretion of a basically uninstructed jury." 446 U. S., at 429.

[6] The concluding sections of the trial judge's opinion read as follows:

"CONCLUSION OF THE COURT

"THERE ARE SUFFICIENT AND GREAT AGGRAVATING CIRCUMSTANCES WHICH EXIST TO JUSTIFY THE SENTENCE OF DEATH AS TO THE DEFENDANT ELWOOD CLARK BARCLAY.

"AUTHORITY FOR SENTENCE

"That under Florida Law the Judge sentences a defendant, convicted of Murder in the First Degree, either to death or life imprisonment. This is an awesome burden to be placed upon the Judge—but in the landmark Florida case of *State* v. *Dixon*, 283 So. 2d 1, the Florida Supreme Court said that when such discretion can 'be shown to be reasonable and controlled, rather than capricious and discriminatory,' then it meets the test of *Furman* v. *Georgia*, 408 U. S. 238.

"COMMENTS OF JUDGE

"My twenty-eight years of legal experience have been almost exclusively in the field of Criminal Law. I have been a defense attorney in criminal cases, an Advisor to the Public Defender's Office, a prosecutor for eight and one-half years and a Criminal Court and Circuit Court Judge—Felony Division—for almost ten years. During these twenty-eight years I have defended, prosecuted and held trial in almost every type of serious crime.

"Because of this extensive experience, I believe I have come to know and understand when, or when not, a crime is heinous, atrocious and cruel and deserving of the maximum possible sentence.

"My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. I, like so many American Combat Infantry Soldiers, walked the battlefields of Europe and saw the thousands of clay claims that the trial judge improperly added a nonstatutory aggravating circumstance of racial hatred and should not have considered his own experiences.

We reject this argument. The United States Constitution does not prohibit a trial judge from taking into account the elements of racial hatred in this murder. The judge in this case found Barclay's desire to start a race war relevant to several statutory aggravating factors.[7] The judge's discussion is neither irrational nor arbitrary. In particular, the comparison between this case and the Nazi concentration camps does not offend the United States Constitution. Such a comparison is not an inappropriate way of weighing the "especially heinous, atrocious, or cruel" statutory aggravating circumstance in an attempt to determine whether it warrants imposition of the death penalty.

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dead American and German soldiers and I witnessed the concentration camps where innocent civilians and children were murdered in a war of racial and religious extermination.

"To attempt to initate such a race war in this country is too horrible to contemplate for both our black and white citizens. Such an attempt must be dealt with by just and swift legal process and when justified by a Jury verdict of guilty—then to terminate and remove permanently from society those who would choose to initiate this diabolical course.

"HAD THE DEFENDANT BEEN EXPOSED TO THE CARNAGE OF THE BATTLEFIELDS AND THE HORRORS OF THE CONCENTRATION CAMPS INSTEAD OF MOVIES, TELEVISION PROGRAMS AND REVOLUTIONARY TRACTS GLORIFYING VIOLENCE AND RACIAL STRIFE—THEN PERHAPS HIS THOUGHTS AND ACTIONS WOULD HAVE TAKEN A LESS VIOLENT COURSE.

"Having set forth my personal experiences above, it is understandable that I am not easily shocked or moved by tragedy—but this present murder and call for racial war is especially shocking and meets every definition of heinous, atrocious and cruel. The perpetrator thereby forfeits further right to life—for certainly his life is no more sacred than that of the innocent eighteen year old victim, Stephen Anthony Orlando." App. 135–139.

[7] The trial judge discussed this point in the course of finding the "great risk of death to many persons," "disrupt or hinder the lawful exercise of

Any sentencing decision calls for the exercise of judgment. It is neither possible nor desirable for a person to whom the State entrusts an important judgment to decide in a vacuum, as if he had no experiences. The thrust of our decisions on capital punishment has been that "'discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" *Zant* v. *Stephens*, 462 U. S. 862, 874 (1983), quoting *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). This very day we said in another capital case:

> "In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar 'central issue' from which the jury's attention may be diverted. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." *California* v. *Ramos*, *post*, at 1008.

We have never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors. But to attempt to separate the sentencer's decision from his experiences would inevitably do precisely that. It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing. We expect that sentencers will exercise their discretion in their own way and to the best of their ability. As long as that discretion is guided in a constitutionally adequate way, see *Proffitt* v. *Florida*, 428 U. S. 242 (1976), and as long as the decision is not so wholly arbitrary as to

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any governmental function or the enforcement of the laws," and "especially heinous, atrocious, or cruel" statutory aggravating circumstances.

offend the Constitution, the Eighth Amendment cannot and should not demand more.

II

In this case the state courts have considered an aggravating factor that is not a proper aggravating circumstance under state law.[8] Barclay argues that a system that permits this sort of consideration does not meet the standards established by this Court under the Eighth and Fourteenth Amendments for imposition of the death penalty.[9] As in *Zant, supra*, at 884, the question whether Barclay's sentence must be vacated depends on the function of the finding of aggravating circumstances under Florida law and on the reason why this aggravating circumstance is invalid.[10]

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[8] Barclay does not, and could not reasonably, contend that the United States Constitution forbids Florida to make the defendant's criminal record an aggravating circumstance. Thus, this case is distinguishable from *Zant* v. *Stephens*, 462 U. S. 862 (1983), where one of the three aggravating circumstances found in Georgia state court was found to be invalid under the Federal Constitution. Of course, a "'mere error of state law' is not a denial of due process." *Engle* v. *Isaac*, 456 U. S. 107, 121, n. 21 (1982), quoting *Gryger* v. *Burke*, 334 U. S. 728, 731 (1948). Thus we need not apply the type of federal harmless-error analysis that was necessary in *Zant, supra*, at 884–889.

[9] Barclay does not contend that the Florida Supreme Court erred in applying the "law of the case" doctrine to this case. His claim seems to be, rather, that the errors in this case were so egregious and the flaws in the Florida statute are so fundamental that his sentence cannot constitutionally be permitted to stand. The Florida Supreme Court did not address Barclay's arguments in precisely the terms he now uses. But, so far as we can tell from the record before us, Barclay did not make his arguments in the same terms on his first appeal. We know from the Florida Supreme Court's opinion in the second appeal that it regarded these questions as having been decided in its first opinion. See *supra*, at 946. It appears, contrary to JUSTICE MARSHALL's assertion, *post*, at 989, that any fault, if fault there be, for failure to elaborate more fully on the relationship of this case to other Florida cases may well lie at the door of petitioner, and not the Supreme Court of Florida.

[10] We have, in some similar circumstances, certified a question to the State Supreme Court in order to ascertain as precisely as possible the state-law basis for a sentence. See *Zant* v. *Stephens*, 456 U. S. 411, 416–417

A

The Florida statute at issue in this case was upheld in *Proffitt* v. *Florida*, *supra*. The opinion of Justices Stewart, POWELL, and STEVENS described the mechanics of the statute as follows:

> "[I]f a defendant is found guilty of a capital offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence. Evidence may be presented on any matter the judge deems relevant to sentencing and must include matters relating to certain legislatively specified aggravating and mitigating circumstances. Both the prosecution and the defense may present argument . . . .
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> "At the conclusion of the hearing the jury is directed to consider '[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.' §§ 921.141(2)(b) and (c) (Supp. 1976–1977). The jury's verdict is determined by majority vote. It is only advisory; the actual sentence is determined by the trial judge. The Florida Supreme Court has stated, however, that '[i]n order to sustain a sentence of death following a jury recommendation of

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(1982). But that procedure would be inappropriate here. Unlike *Zant*, which was a habeas case that originated in the federal court system, this case has already been twice reviewed by the Supreme Court of Florida. On petitioner's second appeal the Supreme Court of Florida declined to address the questions he presents to this Court. Under these circumstances, certification to the Supreme Court of Florida would be little more than a pointed suggestion that it retreat from its "law of the case" position. While we may reverse or modify a state-court judgment which we find erroneously disposes of a federal question, we will not certify a question in these circumstances.

life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.' *Tedder* v. *State*, 322 So. 2d 908, 910 (1975). . . .

"The trial judge is also directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed on a defendant. The statute requires that if the trial court imposes a sentence of death, 'it shall set forth in writing its findings upon which the sentence of death is based as to the facts: (a) *[t]hat sufficient [statutory] aggravating circumstances exist* . . . and (b) *[t]hat there are insufficient [statutory]*[11] *mitigating circumstances . . . to outweigh the aggravating circumstances.*' § 921.141(3) (Supp. 1976–1977).

"The statute provides for automatic review by the Supreme Court of Florida of all cases in which a death sentence has been imposed. § 921.141(4) (Supp. 1976–1977). The law differs from that of Georgia in that it does not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible, and the Supreme Court of Florida, like

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[11] In fact, even before this Court decided *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (evidence at sentencing phase cannot be limited to statutory mitigating circumstances), the Florida Supreme Court had construed this statute to permit consideration of *any* mitigating circumstances. See *Songer* v. *State*, 365 So. 2d 696, 700 (Fla. 1978) (citing cases). The opinion of Stewart, POWELL, and STEVENS, JJ. explicitly recognized that § 921.141(5) does not include language limiting mitigating circumstances to those listed in the statute, but § 921.141(6) provides that "aggravating factors shall be limited to" the statutory aggravating circumstances. 428 U. S., at 250, n. 8. It is not clear from the opinion itself why the opinion inserted the word "statutory" in brackets when quoting § 921.141(b)(3).

> its Georgia counterpart, considers its function to be to '[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.' *State* v. *Dixon*, 283 So. 2d 1, 10 (1973)." 428 U. S., at 248–251 (footnotes omitted) (emphasis supplied).

Thus the Florida statute, like the Georgia statute at issue in *Zant* v. *Stephens*, 462 U. S. 862 (1983), requires the sentencer to find at least one valid statutory aggravating circumstance before the death penalty may even be considered,[12] and permits the trial court to admit any evidence that may be relevant to the proper sentence. Unlike the Georgia statute, however, Florida law requires the sentencer to balance statutory aggravating circumstances against all mitigating circumstances and does not permit nonstatutory aggravating circumstances to enter into this weighing process. *E. g., Mikenas* v. *State*, 367 So. 2d 606 (Fla. 1978). The statute does not establish any special standard for this weighing process.

Although the Florida statute did not change significantly between *Proffitt* and the decision below,[13] the Florida Supreme Court has developed a body of case law in this area. One question that has arisen is whether defendants must be resentenced when trial courts erroneously consider improper aggravating factors. If the trial court found that some mitigating circumstances exist, the case will generally be remanded for resentencing. *Elledge* v. *State*, 346 So. 2d 998, 1002–1003 (Fla. 1977). See, *e. g.*, *Moody* v. *State*, 418 So. 2d 989, 995 (Fla. 1982); *Riley* v. *State*, 366 So. 2d 19, 22 (Fla. 1978). If the trial court properly found that there are no mitigating circumstances, the Florida Supreme Court applies a harmless-error analysis. *Elledge*, *supra*, at 1002–1003. See, *e. g.*, *White* v. *State*, 403 So. 2d 331 (Fla. 1981); *Sireci* v. *State*, 399 So. 2d 964, 971 (Fla. 1981). In such a case, "a reversal of the death sentence would not necessarily be required," *Ferguson* v. *State*, 417 So. 2d 639, 646 (Fla. 1982), because the error might be harmless.

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[12] The language of the statute, which provides that the sentencer must determine whether "sufficient aggravating circumstances exist," § 921.141(3)(a), indicates that any single statutory aggravating circumstance may not be adequate to meet this standard if, in the circumstances of a particular case, it is not sufficiently weighty to justify the death penalty. We have not found a Florida case in which a defendant claimed that a single aggravating circumstance was not "sufficient" within the meaning of § 921.141(3)(a).

[13] The statute was amended in 1979, but the parties agree that the amended statute was not applied to Barclay.

The Florida Supreme Court has not always found that consideration of improper aggravating factors is harmless, even when no mitigating circumstances exist. In *Lewis* v. *State*, 398 So. 2d 432 (Fla. 1981), for example, the defendant shot the victim once in the head through his bedroom window, killing him instantly. The jury recommended life imprisonment, but the trial judge sentenced Lewis to death, finding four aggravating circumstances and no mitigating circumstances. The Florida Supreme Court found that the evidence did not support three of the aggravating circumstances. It did find that the "under sentence of imprisonment" aggravating circumstance was properly applied because Lewis was on parole from a prison sentence when he committed the crime. On these facts, and with only this one relatively weak aggravating circumstance left standing, the Florida Supreme Court did not find harmless error, but rather remanded for resentencing.

The Florida Supreme Court has placed another check on the harmless-error analysis permitted by *Elledge*. When the jury has recommended life imprisonment, the trial judge may not impose a death sentence unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Tedder* v. *State*, 322 So. 2d 908, 910 (1975). In *Williams* v. *State*, 386 So. 2d 538, 543 (1980), and *Dobbert* v. *State*, 375 So. 2d 1069, 1071 (1979), the Florida Supreme Court reversed the trial judges' findings of several aggravating circumstances. In each case at least one valid aggravating circumstance remained, and there were no mitigating circumstances. In each case, however, the Florida Supreme Court concluded that in the absence of the improperly found aggravating circumstances the *Tedder* test could not be met. Therefore it reduced the sentences to life imprisonment.

B

The trial judge's consideration of Barclay's criminal record as an aggravating circumstance was improper as a matter of state law: that record did not fall within the definition of any statutory aggravating circumstance, and Florida law prohibits consideration of nonstatutory aggravating circumstances. In this case, as in *Zant* v. *Stephens*, 462 U. S., at 887–888, nothing in the United States Constitution prohibited the trial court from considering Barclay's criminal record. The trial judge did not consider any constitutionally protected behavior to be an aggravating circumstance. See *id.*, at 884. And, again as in *Zant*, nothing in the Eighth Amendment or in Florida law prohibits the admission of the evidence of Barclay's criminal record. On the contrary, this evidence was properly introduced to prove that the mitigating circumstance of absence of a criminal record did not exist. This statutory aggravating circumstance "plausibly described aspects of the defendant's background that were properly before the [trial judge] and whose accuracy was unchallenged." *Id.*, at 887.

C

The crux of the issue, then, is whether the trial judge's consideration of this improper aggravating circumstance so infects the balancing process created by the Florida statute that it is constitutionally impermissible for the Florida Supreme Court to let the sentence stand. It is clear that the

Court in *Proffitt* did not accept this notion. Indeed, the joint opinion announcing the judgment listed the four aggravating circumstances that had been found against Proffitt, and one of them—"the petitioner has the propensity to commit murder"—was not and is not a statutory aggravating circumstance in Florida. 428 U. S., at 246 (opinion of Stewart, POWELL, and STEVENS, JJ.).

That opinion did state:

> "The petitioner notes further that Florida's sentencing system fails to challenge the discretion of the jury or judge because it allows for consideration of nonstatutory aggravating factors. In the only case to approve such a practice, *Sawyer* v. *State*, 313 So. 2d 680 (1975), the Florida court recast the trial court's six nonstatutory aggravating factors into four aggravating circumstances—two of them statutory. As noted earlier, it is unclear that the Florida court would ever approve a death sentence based entirely on nonstatutory aggravating circumstances. See n. 8, *supra*." *Id.*, at 256–257, n. 14.

While this statement may properly be read to question the propriety of a sentence based entirely on nonstatutory aggravating factors, it is clear that the opinion saw no constitutional defect in a sentence based on both statutory and nonstatutory aggravating circumstances. See also *California* v. *Ramos*, *post*, at 1007–1009, quoting *Zant*, *supra*, at 878.

Barclay's brief is interlarded with rhetorical references to "[l]awless findings of statutory aggravating circumstances," Brief for Petitioner 33, "protective pronouncements which . . . seem to be turned on and off from case to case without notice or explanation," *id.*, at 93, and others in a similar vein. These varied assertions seem to suggest that the Florida Supreme Court failed to properly apply its own cases in upholding petitioner's death sentence. The obvious answer to this question, as indicated in the previous discussion, is that mere errors of state law are not the concern of this Court, *Gryger* v. *Burke*, 334 U. S. 728, 731 (1948), unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution.

In any event, we do not accept Barclay's premise. Cases such as *Lewis, supra, Williams, supra,* and *Dobbert, supra,* indicate that the Florida Supreme Court does not apply its harmless-error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless. There is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance. See n. 9, *supra.* "What is important . . . is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant, supra,* at 879 (emphasis in original).

In this case, as in *Zant, supra,* at 890, our decision is buttressed by the Florida Supreme Court's practice of reviewing each death sentence to compare it with other Florida capital cases and to determine whether "the punishment is too great." *State* v. *Dixon,* 283 So. 2d 1, 10 (1973). See, *e. g., Blair* v. *State,* 406 So. 2d 1103, 1109 (Fla. 1981). It is further buttressed by the rule prohibiting the trial judge from overriding a jury recommendation of life imprisonment unless "virtually no reasonable person could differ." *Tedder* v. *State, supra,* at 910.

The judgment of the Supreme Court of Florida is

Affirmed.

JUSTICE STEVENS, with whom JUSTICE POWELL joins, concurring in the judgment.

Death as a punishment is unique in its severity and irrevocability. Since *Furman* v. *Georgia,* 408 U. S. 238 (1972), this Court's decisions have made clear that States may impose this ultimate sentence only if they follow procedures that are designed to assure reliability in sentencing

determinations. *Gregg* v. *Georgia*, 428 U. S. 153, 189, 196–206 (1976); *Proffitt* v. *Florida*, 428 U. S. 242, 247–253 (1976); *Woodson* v. *North Carolina*, 428 U. S. 280 (1976); *Gardner* v. *Florida*, 430 U. S. 349 (1977); *Roberts* v. *Louisiana*, 431 U. S. 633 (1977); *Lockett* v. *Ohio*, 438 U. S. 586 (1978); *Bell* v. *Ohio*, 438 U. S. 637 (1978); *Green* v. *Georgia*, 442 U. S. 95 (1979); *Godfrey* v. *Georgia*, 446 U. S. 420 (1980); *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982). We have "attempted to provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused." *Eddings*, *supra*, at 111. Again this Term we have reaffirmed our adherence to these principles. *Zant* v. *Stephens*, 462 U. S. 862, 874–880 (1983). Our decisions, taken as a whole, have given substantial content to the guarantees embodied in the Eighth and Fourteenth Amendments.

Particular features of state sentencing schemes may be sufficiently inadequate, unreliable, or unfair that they violate the United States Constitution. Particular death penalty determinations may demonstrate that a State's sentencing procedure is constitutionally inadequate in one or more respects. See, *e. g.*, *Godfrey* v. *Georgia*, *supra*. But this is not such a case. After giving careful consideration to this case and others decided by the Supreme Court of Florida, I am convinced that Florida has retained the procedural safeguards that supported our decision to uphold the scheme in *Proffitt* v. *Florida*, *supra*, and that the death sentence imposed upon Elwood Barclay is consistent with federal constitutional requirements. My conclusions rest on my understanding of certain aspects of Florida's capital sentencing procedures that are not adequately explained in the plurality opinion.

Although I agree with the plurality's conclusion, and with much of what is said in its opinion, I think it important to write separately. The plurality acknowledges, of course, the constitutional guarantees that have been emphasized in our cases since *Gregg*. But in some of its language the plurality speaks with unnecessary, and somewhat inappropriate, breadth. The Court has never thought it sufficient in a capital case merely to ask whether the state court has been "so unprincipled or arbitrary as to somehow violate the United States Constitution." *Ante*, at 947. Nor does a majority of the Court today adopt that standard. A constant theme of our cases—from *Gregg* and *Proffitt* through *Godfrey*, *Eddings*, and most recently *Zant*—has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner. As stated in *Zant*, we have stressed the necessity of "genuinely narrow[ing] the class of persons eligible for the death penalty," and of assuring consistently applied appellate review. 462 U. S., at 877, 890. Accordingly, my primary purpose is to reemphasize these limiting factors in light of the decisions of the Supreme Court of Florida.

I

Florida has adopted a "trifurcated" procedure for identifying the persons convicted of a capital felony who shall be sentenced to death. See *Tedder* v. *State*, 322 So. 2d 908, 910 (1975). Procedurally it consists of a determination of guilt or innocence by the jury, an advisory sentence by the jury, and an actual sentence imposed by the trial judge. Although the court has the authority to reject a jury's recommendation of either life imprisonment or death, the Florida Supreme Court has repeatedly stated that it will scrutinize with special care any death sentence that is imposed after a jury has recommended a lesser penalty.[1]

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[1] *Gilven* v. *State*, 418 So. 2d 996, 999 (1982); *Lewis* v. *State*, 398 So. 2d 432, 438 (1981); *Williams* v. *State*, 386 So. 2d 538, 542 (1980); *McCaskill* v. *State*, 344 So. 2d 1276, 1280 (1977); *Burch* v. *State*, 343 So. 2d 831, 834 (1977); *Tedder* v. *State*, 322 So. 2d 908, 910 (1975) ("In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ").

Analytically the trial judge must make three separate determinations in order to impose the death sentence: (1) that at least one statutory aggravating circumstance has been proved beyond a reasonable doubt; (2) that the existing statutory aggravating circumstances are not outweighed by statutory mitigating circumstances;[2] and (3) that death is the appropriate penalty for the individual defendant.[3]

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[2] The text sets forth the statutory procedure that existed at the time of petitioner's trial in April 1975. Subsequently the Florida Legislature amended the law to prescribe, at stage (2), a determination whether the statutory aggravating circumstances are outweighed by any mitigating circumstances, statutory or nonstatutory. 1979 Fla. Laws, ch. 79-353. See *Moody* v. *State*, 418 So. 2d 989, 995 (Fla. 1982) (setting aside death sentence because sentencing order did not make clear whether the trial court had considered nonstatutory mitigating circumstances). The amended statute, which became effective in July 1979, was not applied to petitioner in his subsequent resentencing proceeding. Brief for Petitioner 23, n. 7.

As long as evidence of mitigation was not excluded from consideration at the sentencing proceeding, see *Songer* v. *State*, 365 So. 2d 696, 700 (Fla. 1978) (construing pre-1979 statute), the version of stage (2) applied in petitioner's case was consistent with our decisions in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982). Neither of these cases establishes the weight which must be given to any particular mitigating evidence, or the manner in which it must be considered; they simply condemn any procedure in which such evidence has no weight at all. See, *e. g.*, *Eddings*, *supra*, at 114-115, and n. 10. The Constitution does not require that nonstatutory mitigating circumstances be considered before the legal threshold is crossed and the defendant is found to be eligible for the death sentence. It is constitutionally acceptable to bring such evidence into the decisionmaking process as part of the discretionary post-threshold determination. In this case petitioner does not contend that any relevant mitigating evidence was excluded from his initial sentencing hearing, or that the trial court or jury was precluded as a matter of law from considering any information or arguments in mitigation. See Brief for Petitioner 18-19 (nonstatutory mitigating circumstances).

[3] The language of the statute is consistent with this tripartite analysis. The jury is instructed to "deliberate and render an advisory sentence to the court, based upon the following matters:

"(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

It is instructive to compare Florida's three-part sentencing scheme with Georgia's two-stage procedure, which we have reviewed and upheld this Term. *Zant* v. *Stephens*, 462 U. S. 862 (1983). Under each of these schemes, the defendant may not be sentenced to death unless the sentencing authority—the jury in Georgia, the judge in Florida—makes a threshold determination guided by specific statutory instructions. Georgia's threshold test is simple: a finding of one valid statutory aggravating circumstance is sufficient to make the defendant eligible for the death penalty. In Florida, that is only the first of two required steps before the threshold is crossed.[4] The court must also determine

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"(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and

"(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death." Fla. Stat. § 921.141(2) (1977).

Similarly, the trial court must impose life unless he makes certain findings, though the statute does not require him to impose death if he does make these findings:

"(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

"(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3) (1977).

With regard to the third stage, Florida case law appears to have evolved over time. An early case suggested that there was no discretion after the first two criteria had been satisfied. *Cooper* v. *State*, 336 So. 2d 1133, 1142 (Fla. 1976) ("Imposition of the death penalty is never pleasant. Here it cannot be avoided. The statute demands a decision from this Court, and we are bound to follow the law. In this case there were three aggravating and no mitigating circumstances. There is no alternative to the death penalty"). In general, however, the Florida Supreme Court appears to recognize that, though the first two findings establish a "presumption," that presumption may be overcome. See, *e. g.*, *Williams* v. *State*, *supra*, at 543 (jury's recommendation of life militates against the presumption).

[4] In both Florida and Georgia, if the appellate court finds that no valid statutory aggravating circumstances are adequately supported by the record, the death sentence cannot stand because the legally mandated

whether any of the statutorily enumerated mitigating circumstances exist,[5] and if so, whether they outweigh the statutory aggravating circumstances. If they do, life imprisonment rather than a death sentence is required. Shortly after the enactment of the current statute, the Florida Supreme Court explained:

> "'[T]he procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present . . . .'" *Elledge* v. *State*, 346 So. 2d 998, 1003 (1977), quoting *State* v. *Dixon*, 283 So. 2d 1, 10 (Fla. 1973).

As we noted in *Proffitt:* "This determination requires the trial judge to focus on the circumstances of the crime and the character of the individual defendant." 428 U. S., at 251.

In both Florida and Georgia, even if the statutory threshold has been crossed and the defendant is in the narrow class of persons who are subject to the death penalty, the sentencing authority is not required to impose the death penalty. In Georgia, the jury is expressly given broad discretion to choose between death and life imprisonment, taking into account all relevant information—aggravating and mitigating—about the character and background of the accused and the circumstances of the crime. See *Zant* v. *Stephens*, *supra*. In Florida, since more information has already been taken

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threshold has not been crossed. See, *e. g.*, *Arnold* v. *State*, 236 Ga. 534, 539–542, 224 S. E. 2d 386, 390–392 (1976); *Kampff* v. *State*, 371 So. 2d 1007, 1009–1010 (Fla. 1979). This is the case, of course, if only nonstatutory aggravating circumstances have been found.

[5] If the trial judge applies the wrong standard in determining the presence or absence of mitigating circumstances, the Florida Supreme Court will vacate the death sentence. *Ferguson* v. *State*, 417 So. 2d 631, 638 (Fla. 1982).

into account in crossing the threshold, the third-stage determination is more circumscribed—whether, even though the first two criteria have been met, it is nevertheless not appropriate to impose the death penalty. Cases reaching this conclusion tend to fall into either or both of two general categories:[6] (1) those in which statutory aggravating circumstances exist, and arguably outweigh statutory mitigating circumstances, but they are insufficiently weighty to support the ultimate sentence;[7] and (2) those in which, even though *statutory* mitigating circumstances do not outweigh statutory aggravating circumstances, the addition of nonstatutory mitigating circumstances tips the scales in favor of life imprisonment.[8]

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[6] These two categories appear at the appellate level in Florida Supreme Court decisions vacating death sentences. It is fair to assume that Florida trial courts, governed by the principles set forth by the State's highest court, apply the same criteria on some occasions to justify imposition of life imprisonment. Such cases would not appear among the reported decisions because the State may not appeal a life sentence. *State* v. *Dixon*, 283 So. 2d 1, 8 (1973).

[7] See *Lewis* v. *State*, 398 So. 2d, at 438–439 (only valid statutory aggravating circumstance was that the defendant was on parole from a prison sentence at the time of the murder; no statutory mitigating circumstances); *Williams* v. *State*, 386 So. 2d, at 543 (at most one valid statutory aggravating circumstance, hindering the enforcement of the laws; no statutory or nonstatutory mitigating circumstances); *Provence* v. *State*, 337 So. 2d. 783, 786–787 (Fla. 1976) (only one statutory aggravating factor, murder in the commission of a robbery; no reference to mitigating circumstances). The existence of this category of cases helps to fulfill one of the constitutionally required functions of a death penalty scheme—"reasonably justify[ing] the imposition of a more severe sentence on the defendant compared to others found guilty of murder," *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983).

[8] As discussed in n. 2, *supra*, under the pre-1979 statute, consideration of nonstatutory mitigating circumstances at the third stage sufficed to satisfy the constitutional requirement set forth in *Lockett* and *Eddings*. This factor, as well as the weakness of the valid aggravating circumstance, apparently underlies the Florida Supreme Court's decision in *Lewis* v. *State*, 398 So. 2d 432 (1981). Lewis' trial took place before the 1979 amendment to the statute. The jury recommended life; the trial court, finding no stat-

Apparently believing that the Federal Constitution so required, the Florida Supreme Court has adopted a rule that the "aggravating circumstances specified in the statute are exclusive, and no others may be used for that purpose." *Purdy* v. *State*, 343 So. 2d. 4, 6 (1977); *Miller* v. *State*, 373 So. 2d 882, 885 (1979); see *Cooper* v. *State*, 336 So. 2d 1133, 1139 (1976); *Provence* v. *State*, 337 So. 2d. 783, 786 (1976).[9] Not only has it held that nonstatutory aggravating circumstances do not satisfy the first threshold criterion—whether statutory aggravating circumstances exist.[10] It has also held

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utory mitigating circumstances, nevertheless imposed the death sentence. The Florida Supreme Court reversed and remanded, stating that "the jury is not limited, in its evaluation of the question of sentencing, to consideration of the statutory mitigating circumstances. It is allowed to draw on any considerations reasonably relevant to the question of mitigation of punishment." *Id.*, at 439.

In addition, in some cases decided under the pre-1979 statute, see n. 2, *supra*, the Florida Supreme Court did not expressly conduct the stage (2) balancing literally required by the statute, but held that the "mitigating circumstances"—including nonstatutory factors—outweighed the aggravating circumstances. See *Halliwell* v. *State*, 323 So. 2d 557, 561 (1975) (defendant, *inter alia*, was a highly decorated Green Beret who had served in Vietnam); *Buckrem* v. *State*, 355 So. 2d 111, 113 (Fla. 1978) (defendant was "gainfully employed").

[9] This rule appears to have been adopted after Barclay's 1975 trial, and after our 1976 decision in *Proffitt*. In that case the trial court relied on three statutory aggravating circumstances and one nonstatutory aggravating factor—that petitioner "has the propensity to commit murder." The Florida Supreme Court, without comment, approved all of these findings, and we upheld the death sentence. *Proffitt* v. *State*, 315 So. 2d 461, 466–467 (1975), aff'd, 428 U. S. 242, 246–247 (1976). See also *Sawyer* v. *State*, 313 So. 2d 680, 681–682 (Fla. 1975) (twice referred to in our *Proffitt* opinion, 428 U. S., at 250, n. 8, 256–257, n. 14). In *Proffitt* we assumed that the trial court was authorized to receive evidence on any matter that it deemed relevant to sentencing. *Id.*, at 248.

[10] *Purdy* v. *State*, 343 So. 2d 4, 6 (1977) ("Under the provisions of Section 921.141, Florida Statutes, aggravating circumstances enumerated in the statute must be found to exist before a death sentence may be imposed. The specified statutory circumstances are exclusive; no others may be used for that purpose").

that evidence supporting nonstatutory aggravating factors simply may not be introduced into evidence at any stage in the sentencing proceeding. See *Elledge* v. *State*, 346 So. 2d, at 1002.[11] Under Florida law, the introduction of such evidence is error, although under some circumstances, the Florida Supreme Court treats it as harmless error.[12]

The Florida rule that statutory aggravating factors must be exclusive affords greater protection than the Federal Constitution requires. Although a death sentence may not rest

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[11] The court remanded to the trial court for a new sentencing trial "at which the factor of the Gaffney murder shall not be considered." 346 So. 2d, at 1003.

[12] In *Elledge*, the trial court imposed the death penalty in reliance on a nonstatutory circumstance and several statutory aggravating circumstances. After holding that consideration of the nonstatutory factor was error, the Florida Supreme Court enunciated the touchstone for determining whether it was reversible error: the presence or absence of mitigating circumstances. As long as mitigating circumstances had been found, it was impossible to know whether the result of the statutorily required weighing process would have been different in the absence of the impermissible nonstatutory aggravating factor. See also *Riley* v. *State*, 366 So. 2d 19, 22 (Fla. 1979); *Mikenas* v. *State*, 367 So. 2d 606, 610 (Fla. 1978); *Menendez* v. *State*, 368 So. 2d 1278, 1281 (Fla. 1979); *Blair* v. *State*, 406 So. 2d 1103, 1109 (Fla. 1981).

On the other hand, as the *Elledge* court also noted, if there were no statutory mitigating circumstances, and if the court had found at least one statutory aggravating circumstance along with a nonstatutory aggravating factor, "there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated by our statute." 346 So. 2d, at 1003. By definition, one or more statutory aggravating circumstances will always outweigh the complete absence of statutory mitigating circumstances. Furthermore, in another case, *Brown* v. *State*, 381 So. 2d 690 (1980), the Florida Supreme Court held that, because the trial court had stated that the one mitigating circumstance, appellant's age, had "only 'some minor significance,'" the death sentence could be sustained even though the court relied on two improper aggravating circumstances as well as two well-founded aggravating circumstances. *Id.*, at 696. "This is so because unlike *Elledge*, here 'we can know' that the result of the weighing process would not have been different had the impermissible factors not been present." *Ibid.*

solely on a nonstatutory aggravating factor, see *Zant* v. *Stephens*, 462 U. S., at 876–878, the Constitution does not prohibit consideration at the sentencing phase of information not directly related to either statutory aggravating or statutory mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime. *Zant, supra,* at 878–879; *Gregg* v. *Georgia*, 428 U. S., at 164, 196–197, 206; *Proffitt* v. *Florida*, 428 U. S., at 242, 248, 256–257, n. 14. As we recently wrote in *Zant*, "[w]hat is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." 462 U. S., at 879.

II

In this case the Florida Supreme Court held that the trial judge had properly determined that at least four statutory aggravating circumstances were present. *Barclay* v. *State*, 343 So. 2d, at 1266, 1270–1271 (1977). Petitioner alleges that none of those four aggravating circumstances withstands scrutiny under Florida law and under our prior cases, including *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). But it is not necessary to agree with the Florida Supreme Court's appraisal of all four findings. Under Florida law, if there are no statutory mitigating circumstances,[13] one valid statutory aggravating circumstance will generally suffice to uphold a death sentence on appeal even if other aggravating circumstances are not valid.[14] The Federal Constitution requires no more, at least as long as none of the invalid aggravating circumstances is supported by erroneous or misleading information. See *Zant* v. *Stephens, supra*, at 887–889.

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[13] Petitioner argues that the jury must have found nonstatutory mitigating circumstances, Brief for Petitioner 90, n. 29, because when it recommended life imprisonment, it stated that "sufficient mitigating circumstances do exist which outweigh any aggravating circumstances." *Id.*, at 88, quoting Sentencing Phase Tr. 180. But at the time of Barclay's trial, nonstatutory mitigating circumstances did not play any role under Florida law in determining whether the legal threshold had been crossed. As we have explained above, this procedure was not constitutionally infirm. See n. 2, *supra*. Nor does the possible existence of nonstatutory mitigating circumstances require that the death sentence automatically be set aside if one or more statutory aggravating circumstances are invalid under state law, or if nonstatutory aggravating factors have improperly been considered. As long as the Federal Constitution did not bar introduction of the

I do not accept petitioner's contention that *none* of the statutory aggravating circumstances found by the trial court may be sustained under Florida law and the Federal Constitution. Tr. of Oral Arg. 15. The trial court found that the murder was "especially heinous, atrocious, or cruel" because the victim "was knocked to the ground and repeatedly stabbed by Barclay as he writhed in pain begging for mercy." App. 46, 133; see *id.*, at 9–14 (statement of facts in sentencing order); 343 So. 2d, at 1271, n. 6.[15] The court also found that the crime took place in the commission of a kidnaping, because "the defendants picked up the hitch-hiking victim with intent to murder him. They refused to take him to the place requested and by force and/or threats kept him in their car until they found an appropriate place for the murder." App. 126; see *id.*, at 39. It is not our role to reexamine the trial court's findings of fact, which have been affirmed by the Florida Supreme Court. Assuming those facts to be true, there is no federal constitutional infirmity in these two findings of statutory aggravating circumstances.

Petitioner challenges the trial court's findings that in committing the murder, he "KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS," and that the murder was committed to "HINDER THE LAW-

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evidence underlying those aggravating factors, it does not require that the death sentence be set aside. See *Zant* v. *Stephens*, 462 U. S., at 888–889.

[14] See n. 12, *supra;* but see n. 7, *supra* (citing cases).

[15] In *Proffitt*, we rejected a facial attack on this aggravating circumstance, see 428 U. S., at 255–256. As applied to the facts found by the trial court in this case, see *ante*, at 942–944, the application of this factor raises no constitutional problems. See *State* v. *Dixon*, 283 So. 2d, at 9; cf. *Godfrey* v. *Georgia*, 446 U. S. 420 (1980).

FUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF THE LAWS." *Id.*, at 122–125, 128–131.[16] He does not, however, dispute the facts recited by the trial court in support of these findings—that he and his colleagues had stalked several potential white victims before picking Stephen Orlando, and that they had sent tapes to a radio station urging mass racial violence. See Brief for Petitioner 5–6, 9–10. This evidence was properly before the advisory jury and the judge because it was admissible at the guilt phase of the proceeding. Thus, whether or not these particular aggravating circumstances have been narrowly defined by the Florida Supreme Court, this case—like *Zant* v. *Stephens*—involves challenged findings of "statutory aggravating circumstance[s] . . . whose terms plausibly described aspects of the defendant's background that were properly before the jury and whose accuracy was unchallenged." 462 U. S., at 887.

I am also unpersuaded by petitioner's contention that the trial court committed reversible error of constitutional magnitude by considering nonstatutory aggravating factors. In its discussion of the statutory aggravating circumstance that the defendant was "under sentence of imprisonment" when he committed the murder, the court noted that petitioner had not been in prison at the time of the offense but that he had an extensive prior criminal record which was "an aggravating circumstance." The court also noted that petitioner's previous conviction for breaking and entering with intent to commit larceny was "more of an aggravating than a negative circumstance," even though the record did not show whether that offense had involved violence, as required by the terms of one of the statutory aggravating circumstances. App. 120–122. But even though, under state law, these factors did not support findings of statutory aggravating circumstances, the information appears to have been properly before the advisory jury and the judge. The Florida Supreme Court has recognized that information about the defendant's prior criminal record may be presented during the sentencing phase to negate one of the statutory mitigating factors. See *Booker* v. *State*, 397 So. 2d 910, 918 (1981). In any event, nothing in the Federal Constitution bars the introduction of a defendant's prior criminal record, which is highly relevant to his individual background and character. See *Zant*, 462 U. S., at 887–888; *Proffitt*, 428 U. S., at 252, n. 9.[17]

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[16] Petitioner bases his challenges to these two aggravating circumstances in large part on *Godfrey* v. *Georgia*, *supra*. See Brief for Petitioner 45, 47, 57–58. We need not decide whether the principles of *Godfrey* have been violated by these two findings, because other statutory aggravating circumstances are valid. In contrast, in *Godfrey*, once the "broad and vague" aggravating circumstance was struck down, no valid statutory aggravating circumstances remained. See *Godfrey*, *supra*, at 426, 432–433, n. 15; *Zant* v. *Stephens*, *supra*, at 878.

Similarly, the judge's candid exposition of his deeply felt concern about racial crimes had no bearing on any statutory aggravating circumstance, but in and of itself it does not undermine the legitimacy of the ultimate sentence.[18] The sentencing process assumes that the trier of fact will exercise judgment in light of his or her background, experiences, and values. Just as sentencing juries "maintain a link between contemporary community values and the penal system," *Gregg* v. *Georgia*, 428 U. S., at 190, sentencing judges "'with experience in the facts of criminality posses[s] the requisite knowledge to balance the facts of the case against the standard criminal activity . . . .'" *Proffitt, supra,* at 252, n. 10, quoting *State* v. *Dixon*, 283 So. 2d, at 8. Of course, if the criteria imposed by law are not satisfied in a particular case, a trial judge's reactions based on his personal experiences cannot justify the death penalty. But that is not the case here.

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[17] In *Proffitt* we expressly noted that the trial court "may order preparation of a presentence investigation report to assist him in determining the appropriate sentence. . . . These reports frequently contain much information relevant to sentencing." 428 U. S., at 252, n. 9. Petitioner's trial took place before this Court's decision in *Gardner* v. *Florida*, 430 U. S. 349 (1977), which held that due process requires that such materials be provided to defense counsel to permit explanation and rebuttal of potentially misleading or inaccurate information. The Florida Supreme Court *sua sponte* vacated the original sentence and remanded for a *Gardner* hearing regarding the accuracy of the undisclosed portions of the presentence investigation report. On remand the trial court found that petitioner's responses did not affect the original sentence; the Florida Supreme Court affirmed; and the issue is not before us on certiorari.

[18] This is not because it assisted the trial court in "weighing the 'especially heinous, atrocious, or cruel' statutory aggravating circumstance," *ante*, at 949, but because it pertained more generally to the trial judge's exercise of his sentencing discretion—the third stage of the sentencing process.

Petitioner emphasizes, however, that the jury recommended life imprisonment and that the court rejected that recommendation. As we held in *Proffitt*, a State may constitutionally give the court the authority to accept or reject the jury's conclusion. 428 U. S., at 252. The court's decision must itself be consistent with constitutional standards, but those standards were not violated in this case. As petitioner's own statement of facts makes clear, the jury was erroneously informed by defense counsel in closing argument that petitioner "had never been convicted of a crime and had no criminal charges pending against him."[19] This statement may have led the jury to believe that there was a statutory mitigating circumstance—no substantial history of prior criminal activity. But the presentence report revealed that petitioner had previously served six months for the felony of uttering a forgery, had been on probation for the felony of breaking and entering with intent to commit grand larceny, and had been arrested on several misdemeanor charges and convicted of at least one.[20] The judge could properly consider that information in deciding whether to accept or reject the jury's recommendation.[21] In addition, even if the jury found that there were nonstatutory mitigating factors, it is clear that the trial court knew of each of the factors petitioner recites and did not find them persuasive.[22] If we find that proper procedures have been followed, in the end it is not our function to decide whether we agree with the 7-to-5 majority of the advisory jury or with the trial judge. The Florida Supreme Court has held that, under state law, it was permissible on these facts for the court to reject the jury's recommendation of life imprisonment. 343 So. 2d, at 1271.[23]

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[19] Brief for Petitioner 18.

[20] App. 17–18, 25, 33, 34–35, 107–108, 121–122.

[21] The Florida statute gives the trial court an independent duty to determine whether mitigating circumstances exist, and the Florida Supreme Court has approved the court's reliance on information not available to the

Finally, petitioner contends that the Florida Supreme Court has abdicated its constitutionally mandated responsibility to perform meaningful appellate review. This contention cannot stand or fall on a single case, particularly since the rather unusual circumstances in this case help to explain the limited analysis provided by the Florida Supreme Court. On direct appeal from the initial imposition of the death sen-

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jury. *White* v. *State*, 403 So. 2d 331, 339–340 (1981); *Swan* v. *State*, 322 So. 2d 485, 488-489 (1975).

[22] See Brief for Petitioner 90–92, n. 29. Barclay was 23 years old, gainfully employed and the father of several children. App. 25, 30–31, 115, 119. He did not inflict the mortal wounds. *Id.*, at 23, 112. Dougan, not Barclay, originated the idea and was the "leading force" in implementing it. *Id.*, at 24, 113. Three other codefendants, Hearn, Crittendon, and Evans, received prison sentences. *Id.*, at 22–24, 113. Recognizing these facts, the trial court also found them to be negated or outweighed by other factors. For example, even though Dougan rendered the "coup de grace," the trial court found that "[t]he evidence shows that Barclay was the first to demonstrate homicidal intent by throwing the victim to the ground and repeatedly stabbing him with a knife." *Id.*, at 23; see *id.*, at 112. And even though Dougan was the ringleader, the court found that both petitioner and Dougan were "the primary culprits" and "both were the major participants," *id.*, at 24–25; see *id.*, at 113–114, and that Barclay was not under the substantial domination of Dougan or any other person. *Id.*, at 26, 114–116.

[23] The Florida Supreme Court has overturned numerous death sentences imposed by trial courts despite a jury recommendation of life imprisonment. See *Walsh* v. *State*, 418 So. 2d 1000, 1003–1004 (1982) (listing 23 such cases). It has also upheld a substantial number of such sentences. *Ibid.* The disposition of each case depends on its particular circumstances.

tence in 1975, it appears that petitioner did not challenge the validity of any of the statutory aggravating circumstances. Pet. for Cert. 2. The sentence was affirmed. Most of the Florida case law on which petitioner now relies was developed after the initial decision in his case. See generally Brief for Petitioner 29–83. Barclay did not receive the benefit of this case law because of the limited nature of the Florida Supreme Court's remand in light of this Court's decision in *Gardner* v. *Florida*, 430 U. S. 349 (1977). When that court vacated the death sentence and ordered the trial court to hold a hearing to permit petitioner to rebut undisclosed information in the presentence report, it applied a uniform procedure which expressly limited the scope of the trial court's proceedings and the scope of appellate review to "matters related to compliance with this order." 362 So. 2d 657, 658 (1978).[24] The court's subsequent opinion accordingly dealt only with the presentence report and treated the previous affirmance of the death sentence as "law of the case" with regard to the aggravating circumstances.

More generally, the question is whether, in its regular practice, the Florida Supreme Court has become a rubber stamp for lower court death-penalty determinations. It has not. On 212 occasions since 1972 the Florida Supreme Court has reviewed death sentences; it has affirmed only 120 of them. The remainder have been set aside, with instructions either to hold a new sentencing proceeding or to impose a life sentence. In making these judgments the court has the benefit of specific written findings by the trial court, setting forth the facts underlying each aggravating and mitigating circumstance. See *State* v. *Dixon*, 283 So. 2d, at 8. Although no appellate court's written decisions, including those of the Florida Supreme Court, are always a model of clarity and analysis, the actual decisions by that court have confirmed one of the premises supporting our decision in *Proffitt*—

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[24] The Florida Supreme Court adopted a uniform procedure for hearings on remand in light of *Gardner* v. *Florida*. It explained this procedure in *Dougan* v. *State*, 398 So. 2d 439, 440 (1981): "Our directive was quite clear that this Court would review a reimposition of the death penalty 'limited to matters related to the compliance with this order.' . . . Our vacation of Dougan's death sentence for *Gardner* relief was technically-based, serving the sole purpose of allowing Dougan's counsel to demonstrate that matters contained in the pre-sentence investigation report were improper and prejudicial."

> "The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.' *Songer* v. *State*, 322 So. 2d 481, 484 (1975). See also *Sullivan* v. *State*, 303 So. 2d 632, 637 (1974)." 428 U. S., at 253.

The cursory analysis in the two opinions upholding petitioner's death sentence—which admittedly I do not applaud—does not require us to set aside the sentence when we have determined that the sentence itself does not suffer from any constitutional flaw.

I therefore concur in the judgment.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Based on a sentencing order rife with errors, the trial judge condemned petitioner Elwood Barclay to death. The Florida Supreme Court then conducted a perfunctory review and affirmed the sentence. Today the plurality approves this miscarriage of justice. In doing so it is utterly faithless to the safeguards established by the Court's prior decisions. I dissent.

I

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman* v. *Georgia*, 408 U. S. 238, 358–369 (1972) (MARSHALL, J., concurring). I would vacate petitioner's death sentence on this basis alone. However, even if I accepted the prevailing view that the death penalty may constitutionally be imposed under certain circumstances, I would vacate the death sentence imposed in this case.

II

In order to assess the process by which petitioner was sentenced to death, it is vital to understand the trial judge's explanation for his sentence of death and the subsequent review of that sentence by the Florida Supreme Court. In my view the plurality's discussion of these matters is woefully incomplete. I therefore begin by setting out the facts necessary for our review.

A

Under Florida law, if a defendant is found guilty of a capital offense, a separate sentencing hearing is held. Fla. Stat. §921.141(1) (1977). After hearing evidence relating to aggravating and mitigating circumstances, the jury renders an advisory verdict. §921.141(2). The judge then imposes sentence. In this case, the jury concluded that sufficient aggravating circumstances did not exist to justify a death sentence and that mitigating circumstances existed which outweighed any aggravating circumstances.[1] It therefore recommended life imprisonment. The trial judge rejected the jury's recommendation, however, and sentenced petitioner to death. The rationale for the judge's decision is set forth in his sentencing order, which states his findings as to the mitigating and aggravating circumstances set out in the Florida capital punishment statute. See App. 1; § 921.141(3).

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[1] See Brief for Petitioner 19 (quoting transcript of penalty trial, at 180); Fla. Stat. §921.141(2) (1977) (jury's advisory verdict is based upon its determination of whether sufficient aggravating circumstances exist and whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances).

The trial judge found that none of the statutory mitigating circumstances applied to Barclay.[2] Instead, the judge concluded that the *absence* of one of the mitigating circumstances itself constituted an aggravating circumstance. Florida law identifies as a mitigating circumstance the fact that a defendant "has no significant history of prior criminal activity." § 921.141(6)(a). The statute does not make the presence of a significant history of prior criminal activity an aggravating circumstance. § 921.141(5). See *Maggard* v. *State*, 399 So. 2d 973, 977–978 (Fla. 1981). Nonetheless, after finding that petitioner had a criminal record, the trial judge stated that the prior record constituted an aggravating circumstance. App. 19. This determination was clearly lawless. The Florida Supreme Court has expressly held that a "substantial history of prior criminal activity is not an aggravating circumstance under the statute." *Mikenas* v. *State*, 367 So. 2d 606, 610 (1978).

The trial judge then turned to the eight aggravating circumstances that the Florida Legislature had actually established.[3] Even though the State had relied on only *one* of these circumstances during the sentencing hearing,[4] the trial judge managed to find that six were relevant.

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[2] The trial judge did not mention the subject of nonstatutory mitigating circumstances. During closing argument at the sentencing trial, petitioner's counsel had contended that such circumstances were present. For example, counsel noted that petitioner was the father of five children and was gainfully employed, and he argued that petitioner was a follower and not a leader among the murderers. He also pointed to the disparity in treatment among the various participants in the crime, three of whom faced punishment for only second-degree murder. The jury's finding that sufficient mitigating circumstances existed which outweighed any aggravating circumstances indicates that the jury found some mitigating circumstances. Cf. *Elledge* v. *State*, 346 So. 2d 998, 1003 (Fla. 1977).

The first aggravating circumstance applies if a capital felony has been "committed by a person under sentence of imprisonment." § 921.141(5)(a). The judge stated that Barclay was *not* under imprisonment at the time of the capital offense—a fact which should have been dispositive under the plain language of the statute. Nonetheless, the judge then pointed to Barclay's prior arrests and the fact that he had previously been on probation for a felony, and he again stated that petitioner's record constituted an aggravating circumstance. App. 33. Reliance on the arrests was certainly improper under Florida law, because any charge which has "not resulted in a conviction at the time of the [capital] trial" is "a nonstatutory aggravating factor." *Elledge* v. *State*, 346 So. 2d 998, 1002 (Fla. 1977). See also *Provence* v. *State*, 337 So. 2d 783, 786 (Fla. 1976). Reliance on the fact that petitioner had formerly been on probation was also error, since the sentence of imprisonment must exist at the time of the capital felony. See *Ferguson* v. *State*, 417 So. 2d 631, 636 (Fla. 1982); *Peek* v. *State*, 395 So. 2d 492, 499 (Fla. 1980).

The second aggravating circumstance found by the trial judge was that petitioner had been "previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." § 921.141(5)(b). The court based this finding on petitioner's presentence report, which showed an earlier conviction for breaking and entering with intent to commit grand larceny. Although there was absolutely no evidence that this prior felony involved the use or threat of violence, the judge asserted that "such crime can and often does involve violence or threat of violence." App. 35. The judge's reliance on this aggravating circumstance was contrary to Florida law. This statutory factor applies only where "the judgment of conviction discloses that it involved violence," *Mann* v. *State*, 420 So. 2d 578, 581 (Fla. 1982), and the Florida Supreme Court has explicitly held that the crime of breaking and entering with intent to commit a felony does *not* constitute a crime of violence within the meaning of this provision. *Lewis* v. *State*, 398 So. 2d 432, 438 (1981); *Ford* v. *State*, 374 So. 2d 496, 501–502, and n. 1 (1979), cert. denied, 445 U. S. 972 (1980). Moreover, the trial judge's reliance on information contained in the presentence report to establish this aggravating circumstance itself constituted an error under state law. See *Williams* v. *State*, 386 So. 2d 538, 542–543 (Fla. 1980).

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[3] See Fla. Stat. § 921.141(5) (1977). Since petitioner's trial, an additional aggravating circumstance has been added to the list. See § 921.141(5)(i) (1981).

[4] See Tr. of Oral Arg. 5.

The trial court next found that petitioner had "knowingly created a great risk of death to many persons." § 921.141(5)(c). This statutory circumstance was directed at conduct creating a serious danger to a large group of people, such as exploding a bomb in a public place or hijacking an airplane.[5] Thus, something in the nature of the homicidal act itself or in the conduct immediately surrounding the act must create a great risk to many people. *Bolender* v. *State*, 422 So. 2d 833, 838 (Fla. 1982); *Ferguson* v. *State*, 417 So. 2d 639, 643, 645 (Fla. 1982); *Tafero* v. *State*, 403 So. 2d 355, 362 (Fla. 1981); *Kampff* v. *State*, 371 So. 2d 1007, 1009 (Fla. 1979); *Elledge* v. *State*, *supra*, at 1004. For example, the aggravating circumstance does not apply when "no one else was around" at the time of the capital felony, even though the murderer then flagged down a passing motorist and struck him with a machete, drove at high speeds over a significant distance, and took a hostage and threatened to kill her. *Mines* v. *State*, 390 So. 2d 332, 337 (Fla. 1980). It is undisputed in this case that the murder took place at "an isolated trash dump" where no one other than the perpetrators and the single victim was present. See *Barclay* v. *State*, 343 So. 2d 1266, 1267 (Fla. 1977). The trial judge incorrectly relied on conduct occurring both *before* and *after* the capital felony. App. 38. Invocation of this aggravating circumstance was therefore clearly unauthorized by state law.

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[5] As the Chairman of the Select Committee on the Death Penalty of the Florida House of Representatives stated during hearings on the 1972 death penalty statute, this aggravating circumstance was intended to apply to cases in which "[t]he defendant knowingly created risk of death to many persons. That's your hijacking sectio[n]." Hearings before the Select Committee on the Death Penalty 66 (Aug. 4, 1972).

The trial court's remaining findings are also problematic. For example, the judge found as a fourth aggravating circumstance that the murder was committed during a kidnaping. *Id.*, at 39–40; see § 921.141(5)(d). However, the only witness who testified about the circumstances prior to the murder noted that the victim, a hitchhiker, willingly entered the car and rode with the defendants voluntarily.[6] At the close of the trial on the issue of guilt, the trial judge himself had deemed the evidence insufficient to establish a kidnaping for purposes of giving a jury instruction as to felony murder.

The trial judge's explanation of his sentence is all the more remarkable in light of two salient requirements of the Florida death penalty scheme. First, each of the statutory aggravating circumstances "must be proved beyond a reasonable doubt before being considered by judge or jury." *State* v. *Dixon*, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U. S. 943 (1974). Second, when the jury has recommended a life sentence, the judge may not impose a death sentence unless "'the facts suggesting a sentence of death [are] so clear and convincing that no reasonable person could differ.'" *Proffitt* v. *Florida*, 428 U. S. 242, 249 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.), quoting *Tedder* v. *State*, 322

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[6] William Hearn, a participant in the murders, testified that the victim asked the other passengers if they smoked marihuana and indicated that he had a friend from whom they could buy some. The victim also engaged in other conversation. See Tr. of Trial 1369–1372.

So. 2d 908, 910 (Fla. 1975). In light of these standards, the judge's sentencing order in this case was totally inadequate.

B

Nor can the sentencing judge's abysmal performance be deemed inadvertent or aberrant. To begin with, after the Florida Supreme Court had vacated the original sentence and remanded the case for reconsideration in light of *Gardner* v. *Florida*, 430 U. S. 349 (1977), petitioner's counsel brought to the attention of the trial judge several flagrant legal errors in the original sentencing order.[7] For example, counsel noted that defendant's prior criminal record was not a proper aggravating circumstance, citing a controlling decision of the Florida Supreme Court, *Mikenas* v. *State*, 367 So. 2d 606 (1978).[8] Even the plurality acknowledges that the trial judge erred in this finding. *Ante*, at 946. Nonetheless, the trial judge drafted a new sentencing order which simply repeated his prior erroneous analysis. App. 107–108.

The trial judge's actions in other capital cases are also instructive. Judge Olliff has sentenced three other defendants to death besides petitioner and his codefendant.[9] In each of these cases, as in petitioner's case, Judge Olliff ignored a jury's advisory sentence of life imprisonment.[10] In each of the cases, as in petitioner's case, the judge failed to find a single mitigating circumstance. The judge has repeatedly found that the felony was committed by a person under a sentence of imprisonment, that the defendant had previously been convicted of a violent felony, and that the defendant created a great risk of death to many persons, *even though virtually all of these findings had no foundation in Florida law.*[11] And each time, Judge Olliff has recounted his experiences during World War II and recited boilerplate language to the effect that he was not easily shocked but that the offense involved shocked him.[12]

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[7] See Tr. of Resentencing Hearing 56–83.

[8] See *id.*, at 61–62.

[9] See *Lewis* v. *State*, 398 So. 2d 432 (Fla. 1981); *Dobbert* v. *State*, 375 So. 2d 1069 (Fla. 1979); *Carnes* v. *State*, Nos. 74–2024, 74–2131 (Cir. Ct. 4th Jud. Cir., Duval County, Florida, Nov. 19, 1974), App. to Brief for Petitioner 15a.

[10] There is only one reported decision in which Judge Olliff did not give a convicted capital felon a death sentence. *Hopkins* v. *State*, 418 So. 2d 1183 (Fla. App. 1982). In that case, however, the judge attempted to sentence the defendant to a term of 199 years and to reserve review of any

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release of the defendant for 66 years, even though such a sentence was not authorized by law. *Id.*, at 1183–1184. The Florida Appellate Court vacated the sentence and remanded for resentencing.

[11] With respect to the statutory provision that the felony had been committed by a person under a sentence of imprisonment, Judge Olliff's findings were as follows. In *Dobbert*, the judge concluded that the circumstance applied even though there was no evidence that Dobbert was under sentence of imprisonment at the time of the murder. See 375 So. 2d, at 1070. In *Carnes*, Judge Olliff concluded that although the defendant was not under sentence of imprisonment, the aggravating circumstance nonetheless applied because Carnes was out on bond on another charge at the time of the offense. App. to Brief for Petitioner 32a. In *Lewis*, the judge correctly concluded that the aggravating circumstance applied. 398 So. 2d, at 438.

With respect to the statutory circumstance of a prior conviction involving a violent felony, in *Lewis* Judge Olliff erroneously relied on convictions for breaking and entering. *Ibid.* In *Dobbert*, the factor was not mentioned. In *Carnes*, Judge Olliff found the circumstance applicable even though the defendant had never been convicted of *any* offense. App. to Brief for Petitioner 33a–34a.

As for the creation of a great risk of death to many persons, the Florida Supreme Court concluded that the judge had erred in finding the circumstance applicable in both *Lewis, supra*, at 438, and *Dobbert, supra*, at 1070. In *Carnes*, Judge Olliff found the aggravating circumstance applicable even though there were only two other people present in the house when the defendant shot the victim and both of them were in another room. App. to Brief for Petitioner 34a–36a.

[12] In *Lewis*, Judge Olliff wrote:

"My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. During World War II, I was a United States

C

In reviewing the hopelessly flawed sentencing order, the Florida Supreme Court did not identify a single error in the trial judge's explanation. Instead, it praised Judge Olliff's performance:

> "The trial judge here painstakingly and with reasoned judgment detailed the factors which caused his departure from the jury's recommendation. *His thorough analysis is precisely the type we would expect* from mature, deliberative judges in this state. It suggests why the Legislature put the trial judges of Florida in the middle of the sentencing process for capital cases." 343 So. 2d, at 1271, n. 8 (emphasis added).

Army Paratrooper and served in ground combat in Europe. I have seen death and suffering in almost every conceivable form.

"I am not easily shocked or moved by tragedy—but this was an especially heinous, atrocious and cruel crime—and is deserving of no sentence but death." App. to Brief for Petitioner 78a.

In *Dobbert*, Judge Olliff wrote:

"'My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. During World War II, I was a United States Army Paratrooper and served overseas in ground combat. I have had friends blown to bits and have seen death and suffering in every conceivable form.

"'I am not easily shocked or [a]ffected by tragedy or cruelty—but this murder of a helpless, defenseless and innocent [person] is the most cruel, atrocious and heinous crime I have eve[r] personally known of—and it is deserving of no sentence but death.'" *Dobbert* v. *Florida*, 432 U. S. 282, 296, n. 9 (1977).

In *Carnes*, Judge Olliff wrote:

"My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. During World War II, I was a United States Army Paratrooper and served overseas in ground combat. I have seen friends blown to bits and have seen death and suffering in almost every conceivable form.

"I am not easily shocked or moved by tragedy—but this was an especially shocking crime." App. to Brief for Petitioner 43a.

The Florida Supreme Court's perfunctory analysis focused on the death sentence imposed on petitioner's codefendant, Jacob Dougan. *Id.*, at 1270–1271. The court subsequently indicated that "virtually the same considerations" applied to Barclay. *Id.*, at 1271. As a result, it never discussed the trial judge's specific findings concerning Barclay. With respect to the aggravating circumstances applicable to Dougan, the Florida Supreme Court stated that "the trial judge recited that four factors essentially had no relevance here." *Ibid.* (footnote omitted). However, two of the factors referred to in this sentence were aggravating circumstances that the trial judge had explicitly discussed.[13] In short, the Florida Supreme Court mischaracterized the trial judge's opinion as to these aggravating circumstances.[14] The Florida Supreme Court then listed the four other aggravating circumstances that had been relied upon and stated in conclusory fashion that the trial judge's findings were "well documented in the record before us." *Ibid.*

The Florida Supreme Court recognized that the jury had recommended a life sentence for Barclay. But the court stated that this recommendation was properly rejected so that there would be no disparity of treatment between Dougan and Barclay: "'Equal Justice Under Law' is carved over the doorway to the United States Supreme Court building in Washington. It would have a hollow ring in the halls of that building if the sentences in these cases were not equalized." *Ibid.* The court ignored the differences between Barclay and Dougan which the jury had apparently found decisive. In addition to obscuring the proper focus on the individual offender, the court's invocation of principles of equal justice is particularly inappropriate in this case in light of the treatment of two of petitioner's codefendants, Evans and Crittendon. Both of these individuals participated in the murder of Stephen Orlando; indeed, Evans was the first to stab Orlando.[15] Moreover, after Orlando was murdered, Evans and Crittendon committed a second murder in the name of the Black Liberation Army *in which petitioner Barclay played absolutely no part.*[16] Yet, these two received prison sentences while Barclay was condemned to death.

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[13] Thus, in summarizing the trial judge's findings, the Florida Supreme Court stated that "Dougan was not under sentence of imprisonment" and "had not been previously convicted of a major felony." 343 So. 2d, at 1271, n. 3. In discussing each of these aggravating circumstances, however, the trial judge had plainly found them applicable. App. 34–35. In contrast, when a circumstance was inapplicable, the trial court was perfectly capable of saying so. For example, in discussing the murder-for-pecuniary-gain factor, § 921.141(5)(f), the trial judge stated: "This paragraph does not seem to apply to the present case." App. 41.

[14] The plurality compounds this distortion by relying on this sentence in the Florida Supreme Court opinion in an effort to cast aside two of the aggravating circumstances that were applied to Barclay. See *ante*, at 946–947.

III

The procedures by which Elwood Barclay was condemned to die cannot pass constitutional muster. First, the trial judge's reliance on aggravating circumstances not permitted under the Florida death penalty scheme is constitutional error that cannot be harmless. Second, the Florida Supreme Court's failure to conduct any meaningful review of the death sentence deprived petitioner of a safeguard that the Court has deemed indispensable to a constitutional capital sentencing scheme.

A

Under Florida law the imposition of the death sentence depends critically on the findings of statutory aggravating circumstances. First, for a defendant to be sentenced to death, the court must determine that "*sufficient* [statutory] aggravating circumstances exist." § 921.141(3)(a) (emphasis added). Second, the court must determine that there are "insufficient mitigating circumstances . . . to outweigh the aggravating circumstances." § 921.141(3)(b). The sentencer therefore not only weighs aggravating against mitigating circumstances, but even in the absence of mitigating circumstances the sentencer must weigh the statutory circumstances alone to determine their sufficiency.

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[15] See Tr. of Resentencing Hearing 28 (testimony of Officer Thomas Reeves, supervising investigator for the murder of Stephen Orlando).

[16] *Id.*, at 6–8.

Florida law clearly limits aggravating circumstances to those enumerated in the statute. § 921.141(5). Thus, "the specified statutory circumstances are exclusive; no others may be used for that purpose." *Purdy* v. *State*, 343 So. 2d 4, 6 (Fla. 1977). Accord, *Odom* v. *State*, 403 So. 2d 936, 942 (Fla. 1981); *Spaziano* v. *State*, 393 So. 2d 1119, 1122–1123 (Fla. 1981); *Miller* v. *State*, 373 So. 2d 882, 885 (Fla. 1979); *Provence* v. *State*, 337 So. 2d, at 786.[17]

Because Florida law prohibits reliance on nonstatutory aggravating circumstances, the trial judge's invocation of such circumstances in this case assumes special significance. In *Hicks* v. *Oklahoma*, 447 U. S. 343 (1980), this Court held that when a State has provided for the imposition of criminal punishment subject to certain procedural protections, it is not correct to say that the denial of one of those protections "is merely a matter of state procedural law." *Id.*, at 346. Eight Justices agreed that the defendant in such a case "has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent" provided for by state law, and that such an interest is constitutionally protected. *Ibid.* See also *Vitek* v. *Jones*, 445 U. S. 480, 488–489 (1980).

The State of Florida has determined that a trial judge may not rely upon nonstatutory aggravating circumstances in sentencing a defendant to death. The propriety of a death sentence imposed on the basis of nonstatutory aggravating circumstances is therefore not merely a matter of state law. A criminal defendant has a substantial and legitimate expectation that such circumstances will not be employed in sentencing him to death. The state-created protection cannot be arbitrarily abrogated, as it was here, without violating the Constitution.

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[17] The Florida death penalty scheme manifestly differs from that in Georgia, as recently interpreted by the Georgia Supreme Court. See *Zant* v. *Stephens*, 462 U. S. 862 (1983). To begin with, Georgia permits the sentencer to rely on nonstatutory aggravating factors so long as at least one valid aggravating circumstance is identified. In addition, the Georgia scheme does not require any weighing of the sufficiency of the statutory aggravating circumstances, nor does it require a weighing of aggravating against mitigating circumstances.

Reliance on nonstatutory aggravating factors also runs afoul of this Court's "insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all." *Eddings* v. *Oklahoma*, 455 U. S. 104, 112 (1982). Fairness and consistency cannot be achieved without "'clear and objective standards' that provide 'specific and detailed guidance.'" *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (plurality opinion), quoting *Proffitt* v. *Florida*, 428 U. S., at 253 (opinion of Stewart, POWELL, and STEVENS, JJ.), and *Woodson* v. *North Carolina*, 428 U. S. 280, 303 (1976) (plurality opinion).[18] Indeed, the Florida death penalty scheme was approved on the understanding that it required "an informed, focused, guided, and objective inquiry into the question whether [a defendant] should be sentenced to death." *Proffitt* v. *Florida*, *supra*, at 259 (opinion of Stewart, POWELL, and STEVENS, JJ.).

Because Florida limits consideration of aggravating circumstances to certain enumerated factors and because the weighing of those factors plays a crucial role in the sentencing process, fairness and consistency cannot be achieved if nonstatutory aggravating circumstances are randomly introduced into the balance. If one judge follows the law in sentencing a capital defendant but another judge injects into the weighing process any number of nonstatutory factors in aggravation, or if the same judge selectively relies on such circumstances, the fate of an individual defendant will inevitably depend on whether on a given day his sentencer happened to respect the constraints imposed by Florida law. The decision to execute a human being surely should not depend on such potluck.

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[18] See also *Hopper* v. *Evans*, 456 U. S. 605, 611 (1982); *Lockett* v. *Ohio*, 438 U. S. 586, 601 (1978) (plurality opinion)

The plurality opinion departs from the Court's past insistence on consistency and fairness in the capital sentencing process. Under the plurality's view, the standard for review of a death sentence would apparently be "limited" to whether its imposition was "so unprincipled or arbitrary as to somehow violate the United States Constitution." *Ante*, at 947.[19] This standard is devoid of any meaningful content. It is simply tautological: a decision to impose the death sentence is not unconstitutional so long as it "is not so wholly arbitrary as to offend the Constitution." *Ante*, at 950–951. This implies that in death cases there are degrees of acceptable arbitrariness and that there exists some undefined point at which a sentence crosses over into the nether world of "wholly" arbitrary decisionmaking. I see no way to reconcile this standard with the requirements of the Constitution.

Nor can I agree that reliance on nonstatutory aggravating circumstances under the Florida scheme can be deemed harmless error. Florida law puts special emphasis on the finding of an aggravating circumstance.[20] Moreover, the sentencer always has discretion not to impose the death sentence in an individual case. Under these circumstances, we are "not at liberty to assume that items given . . . emphasis by the sentencing court did not influence the sentence which the prisoner [received]." *Townsend* v. *Burke*, 334 U. S. 736, 740 (1948). Protecting against the arbitrary imposition of the death penalty "must not become simply a guessing game played by a reviewing court in which it tries to discern whether the improper nonstatutory aggravating factors exerted a decisive influence on the sentence determination. The guarantee against cruel and unusual punishment demands more." *Henry* v. *Wainwright*, 661 F. 2d 56, 59–60 (CA5 1981). Where a life is at stake, the risk that a particular defendant has been selected for the wrong reason is unacceptable and incompatible with the Eighth and Fourteenth Amendments. See *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978). Given the "extraordinary measures" this Court has undertaken to guarantee "as much as is humanly possible" that a death sentence has not been imposed by "mistake," *Eddings* v. *Oklahoma*, *supra*, at 118 (O'CONNOR, J., concurring), a remand for resentencing is the least that is required.

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[19] Only four Justices agree that our review is limited in this fashion. JUSTICE STEVENS, with whom JUSTICE POWELL joins, would insist on more substantial procedural protections. See *ante*, at 959–960.

[20] Because the aggravating factors listed in the Florida statute are exclusive and because the sufficiency of these circumstances must always be weighed, the finding of each statutory aggravating circumstance has special significance under the Florida law, in contrast to the Georgia scheme. See *Zant* v. *Stephens*, *supra*.

B

To avoid the arbitrary and capricious imposition of the death penalty, this Court has also stressed "the further safeguard of meaningful appellate review." *Gregg* v. *Georgia*, 428 U. S., at 195 (opinion of Stewart, POWELL, and STEVENS, JJ.). See *Proffitt* v. *Florida*, *supra*, at 253 (opinion of Stewart, POWELL, and STEVENS, JJ.); *Godfrey* v. *Georgia*, *supra*, at 429 (plurality opinion); *Zant* v. *Stephens*, 456 U. S. 410, 413–414 (1982). In his opinion concurring in the judgment, JUSTICE STEVENS notes the importance of this safeguard. *Ante*, at 973–974. In my view, the failure of the Florida Supreme Court to conduct any considered appellate review in this case requires that petitioner's death sentence be vacated.

If appellate review is to be meaningful, it must fulfill its basic historic function of correcting error in the trial court proceedings. A review for correctness reinforces the authority and acceptability of the trial court's decision and controls the adverse effects of any personal shortcomings in the initial decisionmaker.[21] The Florida Supreme Court's review of Barclay's sentence utterly failed to fulfill this function. The court glossed over all of the errors in the sentencing order. Instead, it lauded the trial judge's performance, stating that Judge Olliff's "thorough analysis is precisely the type we would expect." 343 So. 2d, at 1271, n. 8. Given such encouragement, it is hardly surprising that in subsequent cases Judge Olliff has persisted in misapplying the Florida death penalty statute.[22]

The trial judge in this case plainly misapplied aggravating circumstances enumerated in Florida law. For example, he relied upon a conviction for breaking and entering to establish that petitioner had previously been convicted of a violent felony, even though the Florida Supreme Court has expressly held that such a crime does not satisfy the statutory factor. Similarly, the judge concluded that petitioner had created a great risk of death to many persons even though the homicidal act itself created no such risk. Faced with such findings, the Florida Supreme Court simply failed to consider whether they were consistent with Florida law. Conceivably it would have been possible to reconcile the findings in this case with other decisions which the Florida Supreme Court has rendered, although I doubt it. But if the process of appellate review means anything, it requires that the legal principles applied in one case be harmonized with settled law.

The plurality proceeds on the unfounded assumption that, although errors may have been made by the trial judge, the Florida Supreme Court nonetheless concluded that the errors were harmless. The plurality states:

> "[T]he Florida Supreme Court does not apply its harmless-error analysis in an automatic or mechnical fashion, but rather upholds death sentences on the basis of this

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[21] See P. Carrington, D. Meador, & M. Rosenberg, Justice on Appeal 2 (1976); R. Pound, Appellate Procedure in Civil Cases 3–4 (1941).

[22] See Part II–B, *supra*.

> analysis only when it actually finds that the error is harmless. There is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance." *Ante*, at 958.

The plurality's reliance on the harmless-error doctrine has no relation to the Florida Supreme Court's decision in this case. As one might surmise from the terminology, a "harmless-error" inquiry refers to a process by which an appellate court identifies legal errors and then determines whether they could have affected the judgment being reviewed. Here, the Florida Supreme Court did not identify *any* legal errors in the trial judge's sentencing order; it extolled the merits of the sentencing order. It therefore never reached the question whether the error was harmless. The Florida Supreme Court's decision in this case can readily be contrasted with those decisions in which it actually conducted a harmless-error analysis. For example, in *White* v. *State*, 403 So. 2d 331 (1981), cited *ante*, at 955, the court examined each of the aggravating circumstances upon which the sentencer had relied, explained the errors that the sentencer had committed, and then assessed the significance of the errors. 403 So. 2d, at 337–339.

The plurality's reliance on the harmless-error review conducted by the Florida Supreme Court in *other* cases is entirely misplaced. See *ante*, at 955, 958. When a defendant's life is at stake, it hardly suffices to tell him that some of the time the State's highest court does its job. *Every* defendant sentenced to death is entitled to meaningful appellate review, and where it is clear that the Florida Supreme Court has not provided such review, the death sentence should be vacated.

IV

This case illustrates the capital sentencing process gone awry. Relying on factors not mentioned in Florida law and statutory factors distorted beyond recognition, Judge Olliff overrode the jury's recommendation of life and sentenced petitioner to death. The Florida Supreme Court failed to conduct any meaningful review and instead showered the trial judge with praise for his performance. "Justice of this kind is obviously no less shocking than the crime itself, and the new 'official' murder, far from offering redress for the offense committed against society, adds instead a second defilement to the first." A. Camus, Reflections on the Guillotine 5–6 (R. Howard, trans. 1960). I therefore dissent.

JUSTICE BLACKMUN, dissenting.

Like JUSTICE STEVENS, *ante*, at 974, I cannot "applaud" the procedures and appellate analysis that have led to petitioner's death sentence. Like the Court, however, I cannot "applaud" the undertakings of petitioner and his companions that led to their victim's death in the Jacksonville area that night in June 1974. But when a State chooses to impose capital punishment, as this Court has held a State presently has the right to do, it must be imposed by the rule of law. JUSTICE MARSHALL's opinion convincingly demonstrates the fragility, in Barclay's case, of the application of Florida's established law. The errors and missteps—intentional or otherwise—come close to making a mockery of the Florida statute and are too much for me to condone. Petitioner Barclay, reprehensible as his conduct may have been, deserves to have a sentencing hearing and appellate review free of such misapplication of law, and in line with the pronouncements of this Court.

The final result reached by the Florida courts, and now by this Court, in Barclay's case may well be deserved, but I cannot be convinced of that until the legal process of the case has been cleansed of error that is so substantial. The end does not justify the means even in what may be deemed to be a "deserving" capital punishment situation.

I therefore dissent.

CALIFORNIA *v.* RAMOS

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 81-1893. Argued February 22, 1983—Decided July 6, 1983

At the guilt phase of respondent's California state-court trial, the jury returned a verdict of guilt on a count of first-degree murder, which is punishable under California law by death or life imprisonment without the possibility of parole where an alleged "special circumstance" (here the commission of murder during a robbery) is found true by the jury at the guilt phase. In addition to requiring jury instructions at the separate penalty phase on aggravating and mitigating circumstances, California law requires that the trial judge inform the jury that a sentence of life imprisonment without the possibility of parole may be commuted by the Governor to a sentence that includes the possibility of parole (the so-called Briggs Instruction). At the penalty phase of respondent's trial, the judge's instructions included the Briggs Instruction. The jury returned a verdict of death. The California Supreme Court affirmed respondent's conviction but reversed the death penalty, concluding that the Briggs Instruction violated the Federal Constitution, and remanded the case for a new penalty phase.

Held:

1. The Federal Constitution does not prohibit an instruction permitting a capital sentencing jury to consider the Governor's power to commute a life sentence without possibility of parole. Pp. 997–1009.

(a) The possible commutation of a life sentence does not impermissibly inject an element too speculative for the jury's consideration. By bringing to the jury's attention the possibility that the defendant may be returned to society, the Briggs Instruction invites the jury to assess whether the defendant is someone whose probable future behavior makes it undesirable that he be permitted to return to society, thus focusing the jury on the defendant's probable future dangerousness. A jury's consideration of the factor of future dangerousness was upheld in *Jurek* v. *Texas*, 428 U. S. 262. Nor does giving the Briggs Instruction result in any diminution in the reliability of the sentencing decision of the kind condemned in *Gardner* v. *Florida*, 430 U. S. 349, which held that a death sentence may not be imposed on the basis of a presentence investigation report containing information that the defendant has had no opportunity to explain or deny. The Briggs Instruction gives the jury accurate information of which both the defendant and his counsel are aware, and it does not preclude the defendant from offering any evidence or argument regarding the Governor's power to commute a life sentence. Pp. 1001–1004.

(b) The Briggs Instruction is not constitutionally infirm on the asserted ground that it deflects the jury's focus from its central task of undertaking an individualized sentencing determination. In the sense that the instruction focuses attention on the defendant's future dangerousness, the jury's deliberation is individualized. Also, the California sentencing system ensures that the jury will have before it information regarding the individual characteristics of the defendant and his offense. The Briggs Instruction simply places before the jury an additional element to be considered, along with many other factors, in determining which sentence is appropriate under the circumstances of the defendant's case. It does not affect the jury's guilt/innocence determination. *Beck* v. *Alabama*, 447 U. S. 625, distinguished. Finally, informing the jury of the Governor's power to commute a sentence of life without possibility of parole is merely an accurate statement of a potential sentencing alternative, and corrects the misconception conveyed by the phrase "life imprisonment *without possibility* of parole." Pp. 1005–1009.

2. Nor is the Briggs Instruction unconstitutional because it fails to inform the jury also of the Governor's power to commute a death sentence. Even assuming, *arguendo*, that the Briggs Instruction has the impermissible effect of skewing the jury toward imposing the death penalty, an instruction on the Governor's power to commute death sentences as well as life sentences would not restore "neutrality" or increase the reliability of the sentencing choice. In fact, advising jurors that a death verdict is theoretically modifiable, and thus not "final," may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers. Thus, an instruction disclosing the Governor's power to commute a death sentence may operate to the defendant's distinct disadvantage. Moreover, the Briggs Instruction alone does not impermissibly impel the jury toward voting for the death sentence. This information is relevant and factually accurate and was properly before the jury, and the trial judge's instructions did not emphasize the role of this factor in the jury's decision. Pp. 1010–1012.

3. The conclusion that the Eighth and Fourteenth Amendments do not prohibit an instruction regarding a Governor's power to commute a life sentence, does not override the judgment of state legislatures that capital sentencing juries should not be permitted to consider such matter. The States are free to provide greater protections in their criminal justice system than the Federal Constitution requires. Pp. 1013–1014.

30 Cal. 3d 553, 639 P. 2d 908, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, and in Parts II, III, IV, and V of which BLACKMUN, J., joined, *post*, p. 1015. BLACKMUN, J., *post*, p. 1028, and STEVENS, J., *post*, p. 1029, filed dissenting opinions.

Harley D. Mayfield, Deputy Attorney General of California, argued the cause for petitioner. With him on the brief were *George Deukmejian*, Attorney General, *Robert Philibosian*, Chief Assistant Attorney General, *Daniel J. Kremer*, Assistant Attorney General, and *Jay M. Bloom*, Deputy Attorney General.

Ezra Hendon, by appointment of the Court, 459 U. S. 964, argued the cause and filed a brief for respondent.

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to consider the constitutionality under the Eighth and Fourteenth Amendments of instructing a capital sentencing jury regarding the Governor's power to commute a sentence of life without possibility of parole. Finding no constitutional defect in the instruction, we reverse the decision of the Supreme Court of California and remand for further proceedings.

I

On the night of June 2, 1979, respondent Marcelino Ramos participated in the robbery of a fast-food restaurant where he was employed as a janitor. As respondent's codefendant placed a food order, respondent entered the restaurant, went behind the front counter into the work area ostensibly for the purpose of checking his work schedule, and emerged with a gun. Respondent directed the two employees working that night into the restaurant's walk-in refrigerator and ordered them to face the back wall. Respondent entered and emerged from the refrigerator several times, inquiring at one point about the keys to the restaurant safe. When he entered for the last time, he instructed the two employees to kneel on the floor of the refrigerator, to remove their hats, and to pray. Respondent struck both on the head and then shot them, wounding one and killing the other.

Respondent was charged with robbery, attempted murder, and first-degree murder. Defense counsel presented no evidence at the guilt phase of respondent's trial, and the jury returned a verdict of guilt on all counts. Under California law, first-degree murder is punishable by death or life imprisonment without the possibility of parole where an alleged "special circumstance" is found true by the jury at the guilt phase.[1] At the separate penalty phase, respondent presented extensive evidence in an attempt to mitigate punishment.[2] In addition to requiring jury instructions on aggravating and mitigating circumstances,[3] California law requires that the trial judge inform the jury that a sentence of life imprisonment without the possibility of parole may be commuted by the Governor to a sentence that includes the possibility of parole.[4] At the penalty phase of respondent's trial, the judge delivered the following instruction:

> "You are instructed that under the State Constitution a Governor is empowered to grant a reprieve, pardon, or

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[1] See Cal. Penal Code Ann. § 190.2 (West Supp. 1983). The alleged special circumstance found true in respondent's case was commission of the murder during the course of a robbery. § 190.2(a)(17)(i).

[2] Respondent offered evidence to show, *inter alia*, that his adoptive parents had died while he was young, that he then came under the bad influence of his codefendant, that respondent had mild congenital brain damage, a low intelligence quotient, and borderline schizophrenia, that he was under the influence of alcohol and drugs at the time of the offenses, and that he intended only to "graze" the victims when he shot them.

[3] The jury "shall impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances" and "shall impose" a sentence of life without possibility of parole if the mitigating circumstances outweigh the aggravating circumstances. Cal. Penal Code Ann. § 190.3 (West Supp. 1983).

[4] *Ibid.* This instruction, referred to hereinafter as the "Briggs Instruction," was incorporated into the California Penal Code as a result of a 1978 voter initiative popularly known as the Briggs Initiative.

> commutation of a sentence following conviction of a crime.
>
> "Under this power a Governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole." Tr. 1189–1190.[5]

The jury returned a verdict of death.

On appeal the Supreme Court of California affirmed respondent's conviction but reversed the death sentence, concluding that the Briggs Instruction required by Cal. Penal Code Ann. § 190.3 (West Supp. 1983) violated the Federal Constitution. 30 Cal. 3d 553, 639 P. 2d 908 (1982). The court found two constitutional flaws in the instruction. First, it invites the jury to consider factors that are foreign to its task of deciding whether the defendant should live or die. According to the State Supreme Court, instead of assuring that this decision rests on "consideration of the character and record of the individual offender and the circumstances of the particular offense," *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976), the instruction focuses the jury's attention on the Governor's power to render the defendant eligible for parole if the jury does not vote to execute him and injects an entirely speculative element into the capital sentencing determination. Second, the court concluded that because the instruction does not also inform the jury that the Governor possesses the power to commute a death sentence, it leaves the jury with the mistaken belief that the only way to keep the defendant off the streets is to condemn him to death. Accordingly, the court remanded for a new penalty phase.[6]

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[5] The trial judge gave the instruction over the objection of respondent on the ground that the instruction was mandated by legislation. Tr. 718.

[6] In dissent Justice Richardson concluded that the Briggs Instruction was harmless and nonprejudicial because it merely informs jurors of information that is a matter of common knowledge. Further, the instruction is relevant because the issue of parole is injected into the sentencing process

We granted certiorari, 459 U. S. 821 (1982), and now reverse and remand.[7]

II

In challenging the constitutionality of the Briggs Instruction, respondent presses upon us the two central arguments

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by one of the alternative punishments the jury must consider: life imprisonment without possibility of parole. In addition, the dissent concluded that the instruction's failure also to inform the jury of the Governor's power to commute a death sentence did not render it constitutionally infirm. In *People* v. *Morse*, 60 Cal. 2d 631, 388 P. 2d 33 (1964), the court had held, on the basis of its supervisory powers, that jurors should not be instructed that a death sentence could be commuted because it reduced the jury's sense of responsibility in imposing a capital sentence. Therefore, the Briggs Instruction should not be struck down because it fails to require an instruction of the type condemned in *Morse*.

[7] The Supreme Court of California also concluded that certain testimony by the defense psychiatrist was inadmissible as a matter of state evidence law. Over defense objection, at the penalty phase the prosecutor had been allowed to elicit on cross-examination of the psychiatrist that respondent was aware of the Governor's power to commute a life sentence without parole to a lesser sentence that included the possibility of parole. According to the psychiatrist, respondent had indicated that, were he to be released on parole after 10 or 20 years in prison, "he would probably have built up within himself such feelings of anger and frustration that he would attempt to take revenge on anyone involved in the trial, including the district attorney who prosecuted the case, the judge who presided over it, and the jurors who voted to convict him." 30 Cal. 3d 553, 598, 639 P. 2d 908, 934 (1982) (footnote omitted). The State Supreme Court ruled that the trial court had abused its discretion in admitting this testimony because the prejudice created by admission of the testimony outweighed its probative value. See Cal. Evid. Code Ann. § 352 (West 1966).

Respondent argues that this Court should not reach the constitutional issues raised by the State because the above ruling represents a *possible* adequate and independent state ground for the State Supreme Court's decision to reverse the death sentence. We find no bar to reaching the federal questions. The State Supreme Court quite clearly rested its reversal of the death sentence solely on the Federal Constitution. 30 Cal. 3d, at 562, 600, 639 P. 2d, at 912, 936. Moreover, with respect to its ruling on the evidentiary question, the court did not determine whether this error warranted reversal of the death penalty. It held only that the testimony "should not be admitted if the penalty phase is retried." *Id.*, at 598, n. 22, advanced by the Supreme Court of California in its decision. He contends (1) that a capital sentencing jury may not constitutionally consider[8] possible commutation, and (2) that the Briggs Instruction unconstitutionally misleads the jury by selectively informing it of the Governor's power to commute one of its sentencing choices but not the other. Respondent's first argument raises two related, but distinct concerns—viz., that the power of commutation is so speculative a factor that it injects an unacceptable level of unreliability into the capital sentencing determination, and that consideration of this factor deflects the jury from its constitutionally mandated task of basing the penalty decision on the character of the defendant and the nature of the offense. We address these points in Parts II–B and II–C, *infra*, and respondent's second argument in Part III, *infra*. Before turning to the specific contentions of respondent's first argument, however, we examine the general principles that have guided this Court's pronouncements regarding the proper range of considerations for the sentencer in a capital case.

A

The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a cor-

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639 P. 2d at 934, n. 22. Therefore, the adequacy of this ruling to support reversal of the sentence was not addressed by the state court. See *Michigan* v. *Long*, *post*, p. 1032. Of course, on remand from this Court, the state court is free to determine whether as a matter of state law this evidentiary error is a sufficient basis for reversing the death sentence.

In addition, the Supreme Court of California expressly declined to decide whether the Briggs Instruction independently violates any provisions of the State Constitution. 30 Cal. 3d, at 600, n. 24, 639 P. 2d, at 936, n. 24. As with the evidentiary issue, of course, the state court may address this question on remand.

[8] The Supreme Court of California construed the Briggs Instruction as inviting capital sentencing juries to *consider* the commutation power in its sentencing determination. See *id.*, at 599–600, 639 P. 2d, at 935–936. We view the statute accordingly.

respondingly greater degree of scrutiny of the capital sentencing determination.[9] In ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty. In *Gregg* v. *Georgia*, 428 U. S. 153 (1976), and its companion cases,[10] the Court reviewed the capital sentencing schemes of five States to determine whether those schemes had cured the constitutional defects identified in *Furman* v. *Georgia*, 408 U. S. 238 (1972). In *Gregg* itself, the joint opinion of JUSTICES Stewart, POWELL, and STEVENS concluded that the Georgia sentencing scheme met the concerns of *Furman* by providing a bifurcated proceeding, instruction on the factors to be considered, and meaningful appellate review of each death sentence. 428 U. S., at 189–195. Satisfied that these procedural safeguards "suitably directed and limited" the jury's discretion "so as to minimize the risk of wholly arbitrary and capricious action," *id.*, at 189, the joint opinion did not undertake to dictate to the State the particular *substantive* factors that should be deemed relevant to the capital sentencing decision. Indeed, the joint opinion observed: "It seems clear that the problem [of channeling jury discretion] will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant *that the State, representing organized society, deems particularly relevant to the sentencing decision.*" *Id.*, at 192 (emphasis added). See also *id.*, at 176 ("The deference we owe to the decisions of the state legislatures under our federal system . . . is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy'").[11]

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[9] See *Eddings* v. *Oklahoma*, 455 U. S. 104, 117–118 (1982) (O'CONNOR, J., concurring); *Beck* v. *Alabama*, 447 U. S. 625, 637–638 (1980) (opinion of STEVENS, J., joined by BURGER, C. J., and BRENNAN, Stewart, BLACKMUN, and POWELL, JJ.); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (opinion of BURGER, C. J., joined by Stewart, POWELL, and STEVENS, JJ.); *Gardner* v. *Florida*, 430 U. S. 349, 357–358 (1977) (opinion of STEVENS, J., joined by Stewart, and POWELL, JJ.); *id.*, at 363–364 (WHITE, J., concurring in judgment); *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.).

[10] *Proffitt* v. *Florida*, 428 U. S. 242 (1976); *Jurek* v. *Texas*, 428 U. S. 262 (1976); *Woodson* v. *North Carolina*, *supra* (plurality opinion); *Roberts* v. *Louisiana*, 428 U. S. 325 (1976) (plurality opinion).

It would be erroneous to suggest, however, that the Court has imposed no substantive limitations on the particular factors that a capital sentencing jury may consider in determining whether death is appropriate. In *Gregg* itself the joint opinion suggested that excessively vague sentencing standards might lead to the arbitrary and capricious sentencing patterns condemned in *Furman.* 428 U. S., at 195, n. 46.[12] Moreover, in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), the plurality concluded that a State must structure its capital sentencing procedure to permit consideration of the

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[11] Moreover, in approving the sentencing schemes of Georgia, Florida, and Texas, the joint opinions of JUSTICES Stewart, POWELL, and STEVENS did not substitute their views for those of the state legislatures as to the particular substantive factors chosen to narrow the class of defendants eligible for the death penalty. For example, under the Georgia scheme examined in *Gregg*, at least 1 of 10 specified aggravating circumstances must be found beyond a reasonable doubt before the jury may consider whether death is the appropriate punishment for the individual defendant. 428 U. S., at 164–165. By contrast, under the Texas scheme approved in *Jurek* v. *Texas*, *supra*, the State attempted to limit the category of defendants upon whom the death sentence may be imposed by narrowing capital homicides to intentional and knowing murders committed in five particular situations. See *id.*, at 268. In upholding the Texas scheme, the joint opinion observed: "While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose." *Id.*, at 270.

[12] Cf. *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) (reversing death sentence that rested on unconstitutionally broad and vague construction of an aggravating circumstance).

individual characteristics of the offender and his crime.[13] This principle of individualization was extended in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), where the plurality determined that "the Eighth and Fourteenth Amendments require that the sentencer [in a capital case] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 604 (emphasis in original; footnotes omitted).[14] Finally, in *Gardner* v. *Florida*, 430 U. S. 349 (1977), a plurality of the Court held that a death sentence may not be imposed on the basis of a presentence investigation report containing information that the defendant has had no opportunity to explain or deny.

Beyond these limitations, as noted above, the Court has deferred to the State's choice of substantive factors relevant to the penalty determination. In our view, the Briggs Instruction does not run afoul of any of these constraints.

B

Addressing respondent's specific arguments, we find unpersuasive the suggestion that the possible commutation of a life sentence must be held constitutionally irrelevant[15] to the sentencing decision and that it is too speculative an element for the jury's consideration. On this point, we find *Jurek* v. *Texas*, 428 U. S. 262 (1976), controlling.

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[13] "[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, *supra*, at 304. See also *Gregg* v. *Georgia*, 428 U. S., at 189 (quoting *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U. S. 51, 55 (1937)).

[14] See also *Zant* v. *Stephens*, 462 U. S. 862, 879 (1983); *id.*, at 900 (REHNQUIST, J., concurring in judgment); *Enmund* v. *Florida*, 458 U. S. 782, 798 (1982); *id.*, at 827–828 (O'CONNOR, J., dissenting); *Eddings* v. *Oklahoma*, 455 U. S., at 110–112; *id.*, at 118 (O'CONNOR, J., concurring); *id.*, at 121–122 (BURGER, C. J., dissenting).

[15] See also 30 Cal. 3d, at 596, 639 P. 2d, at 933 ("[The Briggs Instruction] injects into the sentencing calculus an entirely irrelevant factor . . ."); *id.*, at 600, 639 P. 2d, at 935.

The Texas capital sentencing system upheld in *Jurek* limits capital homicides to intentional and knowing murders committed in five situations. *Id.*, at 268. Once the jury finds the defendant guilty of one of these five categories of murder, the jury must answer three statutory questions.[16] If the jury concludes that the State has proved beyond a reasonable doubt that each question is answered in the affirmative, then the death sentence is imposed. In approving this statutory scheme, the joint opinion in *Jurek* rejected the contention that the second statutory question—requiring consideration of the defendant's future dangerousness—was unconstitutionally vague because it involved prediction of human behavior.

> "It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. . . . And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in an-

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[16] The questions are:

"'(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

"'(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

"'(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.' Art. 37.071(b) (Supp. 1975–1976)." 428 U. S., at 269.

> swering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced." *Id.*, at 274–276 (footnotes omitted).

By bringing to the jury's attention the possibility that the defendant may be returned to society, the Briggs Instruction invites the jury to assess whether the defendant is someone whose probable future behavior makes it undesirable that he be permitted to return to society. Like the challenged factor in Texas' statutory scheme, then, the Briggs Instruction focuses the jury on the defendant's probable future dangerousness.[17] The approval in *Jurek* of explicit consideration of this factor in the capital sentencing decision defeats respondent's contention that, because of the speculativeness involved, the State of California may not constitutionally permit consideration of commutation.[18]

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[17] This analogy between the matters raised in the jurors' minds by the Briggs Instruction and the Texas statutory factor of the defendant's future dangerousness is no "intellectual sleight of hand." *Post*, at 1029 (BLACKMUN, J., dissenting). To avoid this analogy is to ignore the process of thought that the Briggs Instruction inevitably engenders in the jury's deliberations. To be sure, the Briggs Instruction by its terms may incline their thoughts to the probability that the current or some future Governor might commute the defendant's sentence. Nevertheless, whatever the jurors' thoughts on this probability alone, the inextricably linked thought is whether it is desirable that this defendant be released into society. In evaluating this question, the jury will consider the defendant's potential for reform and whether his probable future behavior counsels against the desirability of his release into society.

[18] See also ABA Standards for Criminal Justice 18–2.5(c)(i) (2d ed. 1980) (giving as example of legitimate reason for selecting total confinement fact that "[c]onfinement is necessary in order to protect the public from further serious criminal activity by the defendant").

We also observe that, with respect to the relevance of the information conveyed by the Briggs Instruction, the issue of parole or commutation is

Nor is there any diminution in the reliability of the sentencing decision of the kind condemned in *Gardner* v. *Florida*, 430 U. S. 349 (1977). In *Gardner*, the Court reversed a death sentence that had been imposed in part on the basis of a confidential portion of a presentence investigation report that had not been disclosed to either the defendant or his counsel. Because of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed. *Gardner* provides no support for respondent. The Briggs Instruction gives the jury accurate information of which both the defendant and his counsel are aware, and it does not preclude the defendant from offering any evidence or argument regarding the Governor's power to commute a life sentence.[19]

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presented by the language used to describe one of the jury's sentencing choices—*i. e.*, life imprisonment without possibility of parole. The State of California reasonably could have concluded that, while jurors are generally aware of the Governor's power to commute a death sentence, most jurors would not be aware that the Governor also may commute a sentence of life imprisonment without possibility of parole and that they should be so informed to avoid any possible misconception conveyed by the description of the sentencing alternative.

[19] In dissent JUSTICE MARSHALL argues that if a balanced instruction cannot or should not be given, "the solution is not to permit a misleading instruction, but to prohibit altogether any instruction concerning commutation." *Post*, at 1017–1018. This observation is incorrect for at least two reasons. First, as discussed below, see n. 27, *infra*, we do not suggest that there would be any federal constitutional infirmity in giving an instruction concerning the Governor's power to commute the death sentence. We note only that such comment is prohibited under state law. Second, the Briggs Instruction simply is not misleading. On the contrary, the instruction gives the jury accurate information in that it corrects a misleading description of a sentencing choice available to the jury. Although, as Justice Richardson noted below, 30 Cal. 3d, at 605, 639 P. 2d, at 938, most jurors may have a general awareness of the availability of commutation and parole, the statutory description of one of the sentencing choices as "life imprisonment *without possibility* of parole" may generate the misleading

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Closely related to, yet distinct from, respondent's speculativeness argument, is the contention that the Briggs Instruction is constitutionally infirm because it deflects the jury's focus from its central task. Respondent argues that the commutation instruction diverts the jury from undertaking the kind of individualized sentencing determination that, under *Woodson* v. *North Carolina*, 428 U. S., at 304, is "a constitutionally indispensable part of the process of inflicting the penalty of death."

As we have already noted, *supra*, at 1003, as a functional matter the Briggs Instruction focuses the jury's attention on whether this particular defendant is one whose possible return to society is desirable. In this sense, then, the jury's deliberation is individualized. The instruction invites the jury to predict not so much what some future Governor might do, but more what the defendant himself might do if released into society.

Any contention that injecting this factor into the jury's deliberations constitutes a departure from the kind of individualized focus required in capital sentencing decisions was

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impression that the Governor could not commute this sentence to one that included the possibility of parole. The Briggs Instruction merely dispels that possible misunderstanding. Further, the defendant may offer evidence or argument regarding the commutation power, and respondent's counsel addressed the possibility of the Governor's commutation of a life sentence in his closing argument. Tr. 1161–1162. The Briggs Instruction thereby accomplishes the same result that would occur if, instead of requiring the Briggs Instruction, the State merely described the sentence statutorily as "life imprisonment with possibility of commutation." Surely, the respondent cannot argue that the Constitution prohibits the State from accurately characterizing its sentencing choices.

We note further that respondent does not, and indeed could not, contend that the California sentencing scheme violates the directive of *Lockett* v. *Ohio*, 438 U. S. 586 (1978). The California statute in question permits the defendant to present any evidence to show that a penalty less than death is appropriate in his case. Cal. Penal Code Ann. § 190.3 (West Supp. 1983).

implicitly rejected by the decision in *Jurek*. Indeed, after noting that consideration of the defendant's future dangerousness was an inquiry common throughout the criminal justice system, the joint opinion of JUSTICES Stewart, POWELL, and STEVENS observed: "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced." 428 U. S., at 276. As with the Texas scheme, the California sentencing system ensures that the jury will have before it information regarding the individual characteristics of the defendant and his offense, including the nature and circumstances of the crime and the defendant's character, background, history, mental condition, and physical condition. Cal. Penal Code Ann. § 190.3 (West Supp. 1983).[20]

Respondent also relies on *Beck* v. *Alabama*, 447 U. S. 625 (1980), as support for his contention that the Briggs Instruction undermines the jury's responsibility to make an individualized sentencing determination. In *Beck* the Court held that the jury in a capital case must be permitted to consider a verdict of guilt of a noncapital offense where the evidence would support such a verdict. In disapproving the Alabama statute that precluded giving a lesser included offense charge in capital cases, the Court concluded that the chief flaw of the statute "is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." *Id.*, at 642. The failure to give a lesser included offense instruction "diverted" the jury in two ways: a jury might convict a defendant of a capital offense because of its belief that he is guilty of *some* crime, or, given the mandatory nature of the death penalty under Alabama law, the jury might acquit because it does not think that the defendant's crime warrants death. *Id.*, at 642–643. According to the respondent, the Briggs Instruction, like the removal of the lesser included offense option in *Beck*, predisposes the jury to act without regard to whether the death penalty is called for on the facts before it.

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[20] In addition, we note that there is no assurance that a Texas jury acts on a more particularized and less speculative informational base when it considers the defendant's future dangerousness than does a California jury. In *Estelle* v. *Smith*, 451 U. S. 454 (1981), the Court noted that expert psychiatric testimony about the defendant is not necessary to prove the defendant's future dangerousness under the Texas scheme.

> "[U]nder the Texas capital sentencing procedure, the inquiry necessary for the jury's resolution of the future dangerousness issue is in no sense confined to the province of psychiatric experts. . . .
>
> . . . . .
>
> "While in no sense disapproving the use of psychiatric testimony bearing on the issue of future dangerousness, the holding in *Jurek* was guided by recognition that the inquiry mandated by Texas law does not require resort to medical experts." *Id.*, at 472–473.

Consequently, as in the California scheme, a Texas jury's evaluation of the defendant's future dangerousness may rest on lay testimony about the defendant's character and background and the inferences to be drawn therefrom.

We are unconvinced that the Briggs Instruction constrains the jury's sentencing choice in the manner condemned in *Beck*. Restricting the jury in *Beck* to the two sentencing alternatives—conviction of a capital offense or acquittal—in essence placed artificial alternatives before the jury. The unavailability of the "third option" thereby created the risk of an unwarranted conviction. By contrast, the Briggs Instruction does not *limit* the jury to two sentencing choices, neither of which may be appropriate. Instead, it places before the jury an additional element to be considered, along with many other factors, in determining which sentence is appropriate under the circumstances of the defendant's case.

More to the point, however, is the fundamental difference between the nature of the guilt/innocence determination at issue in *Beck* and the nature of the life/death choice at the penalty phase. As noted above, the Court in *Beck* identified the chief vice of Alabama's failure to provide a lesser included offense option as deflecting the jury's attention from "the *central issue* of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." *Id.*, at 642 (emphasis added). In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar "central issue" from which the jury's attention may be diverted.[21] Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment. In this sense, the jury's choice between life and death must be individualized. "But the Constitution does not require the jury to ignore other possible . . . factors in the process of selecting . . . those defendants who will actually be sentenced to death." *Zant* v. *Stephens*, 462 U. S. 862, 878 (1983) (footnote omitted). As we have noted, the essential effect of the Briggs Instruction is to inject into the sentencing calculus a consideration akin to the aggravating factor of future dangerousness in the Texas scheme. See *supra*, at 1003. This element "is simply one of the countless considerations weighed by the jury in seeking to judge the punishment appropriate to the individual defendant." 462 U. S., at 900 (REHNQUIST, J., concurring in judgment).[22]

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[21] "[S]entencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does." *Zant* v. *Stephens*, 462 U. S., at 902 (REHNQUIST, J., concurring in judgment).

[22] Consideration of the commutation power does not undermine the jury's statutory responsibility to weigh aggravating factors against mitigating factors and impose death only if the former outweigh the latter. The desirability of the defendant's release into society is simply one matter that enters into the weighing process. Moreover, the fact that the jury is given no specific guidance on how the commutation factor is to figure into

In short, the concern of *Beck* regarding the risk of an unwarranted conviction is simply not directly translatable to the deliberative process in which the capital jury engages in determining the appropriate penalty, where there is no single determinative issue apart from the general concern that the penalty be tailored to the individual defendant and the offense.

Finally, we emphasize that informing the jury of the Governor's power to commute a sentence of life without possibility of parole was merely an accurate statement of a potential sentencing alternative. To describe the sentence as "life imprisonment *without possibility* of parole" is simply inaccurate when, under state law, the Governor possesses authority to commute that sentence to a lesser sentence that includes the possibility of parole. The Briggs Instruction thus corrects a misconception and supplies the jury with accurate information for its deliberation in selecting an appropriate sentence.[23] See also n. 18, *supra*.

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its determination presents no constitutional problem. As we held in *Zant* v. *Stephens*, *supra*, the constitutional prohibition on arbitrary and capricious capital sentencing determinations is not violated by a capital sentencing "scheme that permits the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute." *Id.*, at 875.

[23] See also ALI, Model Penal Code § 210.6 (Prop. Off. Draft 1962) (providing that, besides aggravating and mitigating factors, the sentencer "shall take into account . . . any other facts that it deems relevant"). The Model Penal Code further states that the court at the sentencing stage "shall inform the jury of the nature of the sentence of imprisonment that may be imposed, including its implication with respect to possible release upon parole, if the jury verdict is against sentence of death." *Ibid.*

Our approval in *Gregg* v. *Georgia* of the wide-ranging evidence informing the penalty determination in Georgia is equally appropriate here:

"We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a [presentence] hearing and to approve open and far-ranging argument. . . . So long as the evidence introduced and the arguments made at the presen-

III

Having concluded that a capital sentencing jury's consideration of the Governor's power to commute a life sentence is not prohibited by the Federal Constitution, we now address respondent's contention that the Briggs Instruction must be held unconstitutional because it fails to inform jurors also that a death sentence may be commuted.[24] In essence, respondent complains that the Briggs Instruction creates the misleading impression that the jury can prevent the defendant's return to society only by imposing the death sentence, thus biasing the jury in favor of death. Respondent therefore concludes that "[i]f . . . commutation is a factor properly

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tence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision." 428 U. S., at 203–204.

[24] Under Art. V, § 8, of the California Constitution and its implementing statutory sections, Cal. Penal Code Ann. § 4800 *et seq.* (West 1982), the Governor possesses broad authority to reprieve, pardon, or commute sentences, including a death sentence.

Although the state statute containing the Briggs Instruction itself requires instruction only on the Governor's power to commute a sentence of life without possibility of parole, Cal. Penal Code Ann. § 190.3 (West Supp. 1983), the trial judge in this case preceded this specific instruction with the additional statement that the Governor "is empowered to grant a reprieve, pardon, or commutation of *a sentence* following conviction of a crime." Tr. 1189–1190 (emphasis added). This statement is ambiguous and might be construed as advising the jury of the Governor's power to commute a death sentence, as well as a life sentence. However, at oral argument both the State and respondent argued that the ambiguity in the quoted sentence should not be interpreted as advising the jury of the possible commutation of a death sentence. Tr. of Oral Arg. 10, 18. More significantly, the State Supreme Court did not interpret the instruction as providing full disclosure of the extent of the Governor's power of commutation. In fact, it affirmatively concluded that the "jury is *not* informed that a sentence of death may be . . . commuted or modified." 30 Cal. 3d, at 597, 639 P. 2d, at 933 (emphasis in original). We defer to the State Supreme Court's finding on this point. See, *e. g.*, *Wolfe* v. *North Carolina*, 364 U. S. 177, 196 (1960); *Lloyd A. Fry Roofing Co.* v. *Wood*, 344 U. S. 157, 160 (1952).

to be considered by the jury, then basic principles of fairness require that full disclosure be made with respect to commutation." Brief for Respondent 35–36.

Thus, according to respondent, if the Federal Constitution permits the jury to consider possible commutation of a life sentence, the Federal Constitution requires that the jury also be instructed that a death sentence may be commuted. We find respondent's argument puzzling.[25] If, as we must assume, respondent's principal objection is that the impact of the Briggs Instruction is to skew the jury toward imposing death, we fail to see how an instruction on the Governor's power to commute death sentences as well as life sentences restores the situation to one of "neutrality." Although such an instruction would be "neutral" in the sense of giving the jury complete and factually accurate information about the commutation power, it would not "balance" the impact of the Briggs Instruction, even assuming, *arguendo*, that the current instruction has any impermissible skewing effect. Disclosure of the complete nature of the commutation power would not eliminate any skewing in favor of death or increase the reliability of the sentencing choice. A jury concerned about preventing the defendant's potential return to society will not be any less inclined to vote for the death penalty upon learning that even a death sentence may not have such an effect. In fact, advising jurors that a death verdict is theoretically modifiable, and thus not "final," may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers.

In short, an instruction disclosing the Governor's power to commute a death sentence may operate to the defendant's distinct disadvantage. It is precisely this perception that the defendant is prejudiced by an instruction on the possible commutation of a death sentence that led the California Supreme Court in *People* v. *Morse*, 60 Cal. 2d 631, 388 P. 2d 33 (1964), to prohibit the giving of such an instruction.[26] Thus, state law at the time of respondent Ramos' trial precluded the giving of the "other half" of the commutation instruction that respondent now argues is constitutionally required.[27]

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[25] We observe incidentally that respondent at no time requested that the trial judge also charge the jury regarding the Governor's power to commute a death sentence.

Moreover, we are not convinced by respondent's argument that the Briggs Instruction alone impermissibly impels the jury toward voting for the death sentence. Any aggravating factor presented by the prosecution has this impact. As we concluded in Part II, *supra*, the State is constitutionally entitled to permit juror consideration of the Governor's power to commute a life sentence. This information is relevant and factually accurate and was properly before the jury. Moreover, the trial judge's instructions "did not place particular emphasis on the role of [this factor] in the jury's ultimate decision."[28] *Zant* v. *Stephens*, 462 U. S., at 889; cf. *id.*, at 888–891.[29]

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[26] Based on its supervisory powers, the Supreme Court of California held in *Morse* that a capital sentencing jury should not be instructed on either the trial judge's or the Governor's possible reduction of a death penalty. The court concluded that, by suggesting that some other authority would review the propriety of the jury's decision to impose death, the instruction tended to reduce the jury's sense of responsibility in fixing the penalty. 60 Cal. 2d, at 652, 388 P. 2d, at 46.

[27] Given our conclusion in Part II, *supra*, that the State may constitutionally permit consideration of the Governor's power to commute a sentence of life imprisonment without possibility of parole, we do not suggest, of course, that the Federal Constitution prohibits an instruction regarding the Governor's power to commute a death sentence.

[28] The trial judge instructed the jury to "consider all of the evidence and all of the applicable instructions on the law which have been received during any part of the trial of this case" and to consider "any other circumstances which extenuate the gravity of the crime even though it is not a legal excuse for the crime." Tr. 1188–1189.

[29] JUSTICE MARSHALL's dissent claims that the Briggs Instruction encourages the jury to impose the death penalty on the basis of an errone-

IV

In sum, the Briggs Instruction does not violate any of the substantive limitations this Court's precedents have imposed on the capital sentencing process. It does not preclude individualized sentencing determinations or consideration of mitigating factors, nor does it impermissibly inject an element too speculative for the jury's deliberation. Finally, its failure to inform the jury also of the Governor's power to commute a death sentence does not render it constitutionally infirm. Therefore, we defer to the State's identification of the Governor's power to commute a life sentence as a substantive factor to be presented for the sentencing jury's consideration.

Our conclusion is not intended to override the contrary judgment of state legislatures that capital sentencing juries in their States should not be permitted to consider the Governor's power to commute a sentence.[30] It is elementary that

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ous assumption that a defendant sentenced to death will not be released. *Post,* at 1016. We emphasize that the instruction is informational and satisfies the *Jurek* requirement that "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." 428 U. S., at 276. In addition, JUSTICE MARSHALL wrongly assumes that the Briggs Instruction will be the determining factor in the jury's choice of the appropriate punishment. As we have emphasized, *supra,* at 1008, the Briggs Instruction "does not advise or encourage the jury to reach its verdict in reliance upon this information." 30 Cal. 3d, at 603, 639 P. 2d, at 937 (Richardson, J., dissenting). In addition, as stated above, the trial judge's instructions in this case did not emphasize the role of this factor in the jury's decision.

[30] See, *e. g.,* Ga. Code Ann. § 17–8–76 (1982) (prohibiting argument as to possibility of pardon, parole, or clemency).

Many state courts have held it improper for the jury to consider or to be informed—through argument or instruction—of the possibility of commutation, pardon, or parole. The basis of decision in these cases is not always clear—*i. e.,* it often does not appear whether the state court's decision is based on federal constitutional principles. In many instances, however, the state court's decision appears to rest on an interpretation of the State's capital sentencing system and the division of responsibility be-

States are free to provide greater protections in their criminal justice system than the Federal Constitution requires. We sit as judges, not as legislators, and the wisdom of the decision to permit juror consideration of possible commutation is best left to the States. We hold only that the Eighth and Fourteenth Amendments do not prohibit such an instruction.

The judgment of the Supreme Court of California is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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tween the sentencer and other authorities effected by that scheme. See, *e. g.*, *People* v. *Walker*, 91 Ill. 2d 502, 515, 440 N. E. 2d 83, 89–90 (1982) ("*Our statute requires* that the court or jury, as the case may be, consider aggravating and mitigating factors, which are relevant to the imposition of the death penalty. . . . Whether or not the defendant may, at some future time, be paroled is not a proper aggravating factor to consider in determining whether the death penalty should be imposed") (emphasis added); *State* v. *Lindsey*, 404 So. 2d 466, 486 (La. 1981) ("Nowhere in the entire sentencing scheme does the [state code of criminal procedure] provide that the sentencing jury may consider the offender's future potential for release should a life sentence be imposed. . . . [G]iving a jury *carte blanche* permission to decide the potential factual consequences of a life sentence allows it to weigh the alternative not in terms of the clear meaning provided for it *by the legislature*, but in terms of a particular number of years versus the death penalty, thereby undermining the jury's responsibility to accept the law as given by the legislature through the court") (emphasis added); *Poole* v. *State*, 295 Md. 167, 197, 453 A. 2d 1218, 1233 (1983) ("[T]his type of argument is likely to allow the jury to disregard its duty to determine aggravating and mitigating factors, and to then balance one against the other *as required by [the state statute]* . . . . Any consideration of the possibility of parole as such simply is *irrelevant* . . .") (emphasis added); *State* v. *Atkinson*, 253 S. C. 531, 535, 172 S. E. 2d 111, 112 (1970) ("'The Legislature committed to the jury the responsibility to determine in the first instance whether punishment should be life or death. It charged another agency with the responsibility of deciding how a life sentence shall be executed'") (quoting *State* v. *White*, 27 N. J. 158, 177–178, 142 A. 2d 65, 76 (1958)). See also *Sukle* v. *People*, 107 Colo. 269, 273, 111 P. 2d 233, 235 (1941) (consideration of parole outside proper scope of jury's duty as fixed by statute); *State* v. *Jones*, 296 N. C. 495, 502–503, 251 S. E. 2d 425, 429 (1979).

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, and with whom JUSTICE BLACKMUN joins as to Parts II, III, IV, and V, dissenting.

Even if I accepted the prevailing view that the death penalty may constitutionally be imposed under certain circumstances, I could not agree that a State may tip the balance in favor of death by informing the jury that the defendant may eventually be released if he is not executed. In my view, the Briggs Instruction is unconstitutional for three reasons. It is misleading. It invites speculation and guesswork. And it injects into the capital sentencing process a factor that bears no relation to the nature of the offense or the character of the offender.

I

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman* v. *Georgia*, 408 U. S. 238, 358–369 (1972) (MARSHALL, J., concurring). I would vacate the death sentence on this basis alone. However, even if I could accept the prevailing view that the death penalty may constitutionally be imposed under certain circumstances, I would vacate the death sentence in this case.

II

Apart from the permissibility of ever instructing a jury to consider the possibility of commutation, the Briggs Instruction is unconstitutional because it misleads the jury about the scope of the Governor's clemency power. By upholding that instruction, the majority authorizes "state-sanctioned fraud and deceit in the most serious of all state actions: the taking of a human life." 30 Cal. 3d 553, 597, n. 21, 639 P. 2d 908, 933, n. 21 (1982). See *ibid.* (if the instruction were "part of a contractual negotiation, it would arguably constitute a tortious deceit and a fraudulent misrepresentation").

The Briggs Instruction may well mislead the jury into believing that it can eliminate any possibility of commutation by imposing the death sentence. It indicates that the Governor can commute a life sentence without possibility of parole, but not that the Governor can also commute a death sentence. The instruction thus erroneously suggests to the jury that a death sentence will assure the defendant's permanent removal from society whereas the alternative sentence will not. See *People* v. *Haskett*, 30 Cal. 3d 841, 861, 640 P. 2d 776, 789 (1982).

Presented with this choice, a jury may impose the death sentence to prevent the Governor from exercising his power to commute a life sentence without possibility of parole.[1] See *Gardner* v. *Florida*, 430 U. S. 349, 359 (1977) (opinion of STEVENS, J.) ("we must assume that in some cases [the instruction] will be decisive"). Yet such a sentencing decision would be based on a grotesque mistake, for the Governor also has the power to commute a death sentence. The possibility of this mistake is deliberately injected into the sentencing process by the Briggs Instruction. In my view, the Constitution simply does not permit a State to "stac[k] the deck" against a capital defendant in this manner. *Witherspoon* v. *Illinois*, 391 U. S. 510, 523 (1968). See *Adams* v. *Texas*, 448 U. S. 38, 43–44 (1980).

The majority assumes that the issue is whether a "balanced" instruction would cure the defect. *Ante*, at 1011. It then argues that an instruction about the Governor's power to commute a death sentence would be seriously prejudicial to the defendant and could not in any event have been given since it is forbidden by state law. *Ante*, at 1011–1012.[2] This analysis is based on a fundamental misunderstanding of the issue. The question is not whether a balanced instruction would be more or less advantageous to defendants, but whether the Briggs Instruction is misleading and therefore unconstitutional.

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[1] State courts have recognized that juries will compensate for the possibility of future clemency by imposing harsher sentences. See, *e. g.*, *Farris* v. *State*, 535 S. W. 2d 608, 614 (Tenn. 1976); *Smith* v. *State*, 317 A. 2d 20, 25–26 (Del. 1974); *State* v. *White*, 27 N. J. 158, 177–178, 142 A. 2d 65, 76 (1958).

If the Briggs Instruction is indeed misleading, *and the majority never denies that it may lead jurors to impose a death sentence because they wrongly assume that such a sentence will ensure that the defendant will not be released*, it can hardly be defended on the ground that a balanced instruction would be more prejudicial.[3] If, as the majority points out, there are compelling reasons for not informing the jury as to the Governor's power to commute death sentences, the solution is not to permit a misleading instruction, but to prohibit altogether any instruction concerning commutation. This point seems to have eluded the majority. For some inexplicable reason it concludes that, since a balanced instruction is unavailable, the State is free to mislead the jury about the Governor's clemency power. One searches the majority opinion in vain for some explanation of how the State's inability to give a complete statement of the Governor's commutation powers can possibly justify giving an incomplete statement that is misleading.

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[2] In a footnote the majority notes that the respondent did not request a jury charge regarding the Governor's power to commute a death sentence. *Ante*, at 1011, n. 25. It makes nothing of this fact, however, for reasons that are plain: the California Supreme Court did not find that respondent had waived any objection to the misleading nature of the Briggs Instruction, and, in any event, such an instruction was forbidden by State law.

[3] For some of the reasons articulated by the majority, *ante*, at 1011, the Constitution would presumably forbid instructing a jury in a capital sentencing proceeding to consider the Governor's powers to commute a death sentence. See generally *Farris* v. *State*, *supra*, at 614 (noting that such an instruction "tends to breed irresponsibility on the part of jurors premised upon the proposition that corrective action can be taken by others at a later date"); *State* v. *Jones*, 296 N. C. 495, 501, 251 S. E. 2d 425, 429 (1979) (jury's sense of responsibility will be reduced by reliance on executive review). The majority suggests that a defendant is free to correct the misleading impression created by the Briggs Instruction by informing jurors about the Governor's power to commute death sentences. *Ante*, at 1004–1005, n. 19. This suggestion is anomalous indeed, since the majority itself has concluded that jurors so informed will be inclined "to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers." *Ante*, at 1011. I cannot agree that a State may force a defendant to choose between being sentenced by a jury which is misinformed and one which is unlikely to view its task with the requisite sense of responsibility.

I had thought it was common ground that the capital sentencing process must be as reliable, as rational, and as free of mistakes as is humanly possible. Yet the Court upholds the Briggs Instruction without ever disputing its substantial potential to mislead. The Court thus authorizes the State to "cros[s] the line of neutrality" and encourage death sentences by deceiving the jury. *Witherspoon*, *supra*, at 520.

III

The Briggs Instruction should be struck down not only because it is misleading, but also because it invites the imposition of the death penalty on the basis of mere speculation. As the majority concedes, *ante*, at 998, n. 8, the Briggs Instruction invites the jury to consider the possibility that if it does not sentence the defendant to death, he may be released through commutation and subsequent parole. The instruction thus invites the jury to speculate about the possibility of release and to decide whether it wishes to foreclose that possibility by imposing a death sentence. Respondent contends that a State may not invite a jury to impose a death sentence on the basis of its ad hoc speculation about the likelihood of a release.

Instead of directly confronting this contention, the majority denies that the principal effect of the Briggs Instruction is to invite the jury to predict the actions of some future Governor and parole board. It instead characterizes the Briggs Instruction as a mere proxy for a determination of future dangerousness. *Ante*, at 1003, 1005–1006. It then reasons that because the Texas scheme upheld in *Jurek* v. *Texas*, 428 U. S. 262 (1976), requires the jury to determine a defendant's future dangerousness, *Jurek* is "controlling," *ante*, at 1002, and the Briggs Instruction is therefore constitutional.

The Briggs Instruction simply cannot be reduced to the functional equivalent of the scheme upheld in *Jurek*. It neither requires nor even suggests that a jury should make a finding concerning the defendant's future dangerousness, and the jury is provided with no evidence on which to base any such finding.[4] More importantly, whatever else the Briggs Instruction might incidentally lead juries to consider, the one thing it expressly invites them to do is to impose the death penalty on the basis of their ad hoc speculations as to the likelihood of commutation.

Individual jury predictions of the possibility of commutation and parole represent no more than "sheer speculation." *Godfrey* v. *Georgia*, 446 U. S. 420, 429 (1980) (plurality opinion). A jury simply has no basis for assessing the likelihood that a particular defendant will eventually be released if he is not sentenced to death. To invite the jury to indulge in such speculation is to ask it to foretell numerous imponderables: the policies that may be adopted by unnamed future Governors and parole officials, any change in the defendant's character, as well as any other factors that might be deemed relevant to the commutation and parole decisions. Yet these are questions that "no human mind can answer . . . because they rest on future events which are unpredictable." *People* v. *Morse*, 60 Cal. 2d 631, 643, 388 P. 2d 33, 40 (1964). This is inevitable in part because the commutation decision itself is standardless.

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[4] The Briggs Instruction merely invites the jury to speculate about the likelihood of future release; it says nothing about whether there is a likelihood of future criminal activity in the event of such release. A jury may decide to impose the death penalty to prevent a defendant's release simply because it has concluded that the defendant does not "deserve" to reenter society, and not because of any concern about his dangerousness. *Jurek* says nothing about the permissibility of imposing a death sentence on this basis.

In addition, although a jury presented with the Briggs Instruction might choose to take into account future dangerousness, this in no way makes the instruction the functional equivalent of the Texas scheme. In upholding the Texas scheme this Court stressed that the Texas law assured that "all possible relevant information" is presented to the jury. 428 U. S., at 276. Under the Briggs Instruction not only is the jury not required to make any finding concerning the defendant's future dangerousness, but also there is no requirement that *any* evidence of future dangerousness be introduced. Indeed, with rare exceptions such evidence is inadmissible under California law. See *People* v. *Murtishaw*, 29 Cal. 3d 733, 767–775, 631 P. 2d 446, 468–471 (1981), cert. denied, 455 U. S. 922 (1982).

The predictive inquiry becomes even more hazardous if, as the majority suggests, the jury also considers whether the defendant would pose a threat to society if and when he is released. A jury, in short, would have to assess not only the likelihood that the defendant will be released, but also the likelihood that his release will be a mistake. I fail to see how any jury can be expected to forecast the future character of a particular defendant and the risk that some state authority, armed with contemporaneous information about his character whose contents the jury can only guess at, will misjudge his character and erroneously release him.

Sentencing decisions based on such groundless predictions are clearly arbitrary and capricious. As the Tennessee Supreme Court put it, a death sentence imposed on this basis is the product of "mere guesswork."[5] If the predictions of particular juries reflect little more than wild speculation, then differences among juries in their predictions are no less the product of caprice and not reason. Yet the Briggs Instruction creates the possibility that one defendant may be sentenced to die while another is permitted to live because the first jury perceived a greater likelihood of commutation and parole. This hardly constitutes a meaningful, principled basis for distinguishing a case in which the death penalty is imposed from one in which it is not. *Gregg* v. *Georgia*, 428 U. S., at 188, quoting *Furman* v. *Georgia*, 408 U. S., at 313 (WHITE, J., concurring). See also *Godfrey* v. *Georgia*, *supra*, at 433; *Lockett* v. *Ohio*, 438 U. S. 586, 601 (1978) (plurality opinion).

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[5] *Farris* v. *State*, 535 S. W. 2d, at 613–614, quoting *Graham* v. *State*, 304 S. W. 2d 622, 624 (1957). Accord, *State* v. *Leland*, 190 Ore. 598, 623, 227 P. 2d 785, 796 (1951) ("purely speculative"); *Jones* v. *Commonwealth*, 194 Va. 273, 279, 72 S. E. 2d 693, 697 (1952) (results in punishment based on "speculative elements"); *State* v. *Lindsey*, 404 So. 2d 466, 487 (La. 1981) ("unquantifiable factor").

The imposition of death sentences on the basis of sheer speculation about unknowables can only be arbitrary and capricious. Our prior cases have stressed the heightened need for reliability and rationality in the determination of whether an individual should be sentenced to death. *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion); *Lockett* v. *Ohio*, *supra*, at 604; *Gardner* v. *Florida*, 430 U. S., at 359. The Briggs Instruction injects a level of unreliability, uncertainty, and arbitrariness "that cannot be tolerated in a capital case." *Beck* v. *Alabama*, 447 U. S. 625, 643 (1980).

IV

Even if the Briggs Instruction did not mislead the jury and call for guesswork, it would be unconstitutional for the independent reason that it introduces an impermissible factor into the capital sentencing process.

The instruction invites juries to impose the death sentence to eliminate the possibility of eventual release through commutation and parole. Yet that possibility bears no relation to the defendant's character or the nature of the crime, or to any generally accepted justification for the death penalty. Since any factor considered by the jury may be decisive in its decision to sentence the defendant to death, *Gardner* v. *Florida*, *supra*, at 359 (opinion of STEVENS, J.), the jury clearly should not be permitted to consider just *any* factor. Rather, it should only be permitted to consider factors which can provide a principled basis for imposing a death sentence rather than a life sentence. See *Zant* v. *Stephens*, 462 U. S. 862, 885 (1983) (noting that jury may not consider race, religion, or political affiliation, and suggesting that factors which are truly mitigating cannot be the basis for imposing a death sentence).

In my view, the Constitution forbids the jury to consider any factor which bears no relation to the defendant's character or the nature of his crime, or which is unrelated to any penological objective that can justify imposition of the death penalty. Our cases establish that a capital sentencing proceeding should focus on the nature of the criminal act and the character of the offender. "[I]n order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it [must] be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." *Gregg* v. *Georgia*, *supra*, at 199 (opinion of Stewart, POWELL, and STEVENS, JJ.). The Court has thus stressed that the appropriateness of the death penalty should depend on "relevant facets of the character and record of the individual offender." *Woodson* v. *North Carolina*, *supra*, at 304. Considerations such as the extent of premeditation, the nature of the crime, and any prior criminal activity have been considered relevant to the determination of the appropriate sentence. The requirement that the jury focus on factors such as these is designed to ensure that the punishment will be "*tailored* to [the defendant's] personal responsibility and moral guilt." *Enmund* v. *Florida*, 458 U. S. 782, 801 (1982) (emphasis added).

In sharp contrast, the mere possibility of a commutation "is wholly and utterly foreign to"[6] the defendant's guilt and "not even remotely related to"[7] his blameworthiness. That possibility bears absolutely no relation to the nature of the offense or the character of the individual. Whether a defendant's crime warrants the death penalty should not turn on "a speculative possibility that may or may not occur."[8]

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[6] *Farris* v. *State*, *supra*, at 614.

[7] *State* v. *Lindsey*, *supra*, at 486.

The possibility of commutation has no relationship to the state purposes that this Court has said can justify the death penalty. Capital punishment simply cannot be justified as necessary to keep criminals off the streets. Whatever might be said concerning retribution and deterrence as justifications for capital punishment, it cannot be seriously defended as necessary to insulate the public from persons likely to commit crimes in the future. Life imprisonment and, if necessary, solitary confinement would fully accomplish the aim of incapacitation. See *Gregg* v. *Georgia*, *supra*, at 236, n. 14 (MARSHALL, J., dissenting); *Furman* v. *Georgia*, *supra*, at 355–359 (MARSHALL, J., concurring). That the death penalty cannot be justified by considerations of incapacitation was implicitly acknowledged in *Gregg*, where the joint opinion of JUSTICES Stewart, POWELL, and STEVENS relied entirely on retribution and deterrence as possible justifications for the death penalty, 428 U. S., at 183, and mentioned incapacitation only in passing as "[a]nother purpose that has been discussed." *Id.*, at 183, n. 28.[9]

This conclusion is in no way altered by California's decision to establish an alternative sentence to death that does not guarantee permanent confinement. If a death sentence is inappropriate, a State cannot justify its imposition on the ground that the alternative it has provided, which in this case leaves open the possibility of future release, may be considered inadequate by the jury. An analogy may be usefully drawn to this Court's decision in *Beck* v. *Alabama*, 447 U. S. 625 (1980). In *Beck* we struck down an instruction which created a risk that a defendant would be convicted of a crime of which he was not guilty. We necessarily rejected any suggestion that such an instruction could be justified by the fact that the alternative it presented was no conviction at all. Presenting the jury in a capital case with the choice between an unwarranted conviction and an acquittal is impermissible because it may induce the jury to convict simply to ensure that the defendant receives some punishment. Such a choice "would seem inevitably to enhance the risk of an unwarranted conviction." *Id.*, at 637. Similarly, a defendant may not be sentenced to death simply because the alternative the State has adopted does not ensure incapacitation. The State may not use the unavailability of permanent imprisonment to induce juries to sentence to death defendants whose appropriate punishment is something less severe. "That death should be inflicted when a life sentence is appropriate is an abhorrent thought." *State* v. *White*, 27 N. J. 158, 178, 142 A. 2d 65, 76 (1958).

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[8] *People* v. *Walker*, 91 Ill. 2d 502, 515, 440 N. E. 2d 83, 89 (1982).

[9] *Jurek* v. *Texas*, 428 U. S. 262 (1976), does not establish that the goal of incapacitation may justify the death penalty. This question was not addressed in *Jurek*. The petitioner in *Jurek* did not attack the Texas capital sentencing scheme on this ground, but rather contended that the scheme would not prevent the arbitrary and capricious infliction of the death penalty. The Court rejected this attack on the *procedures* prescribed by the Texas scheme, *id.*, at 268–276 (opinion of Stewart, POWELL, and STEVENS, JJ.); *id.*, at 278–279 (WHITE, J., joined by BURGER, C. J., and REHNQUIST, J., concurring in judgment), but did not decide the *substantive* question of whether a prediction of future dangerousness is a proper criterion for determining whether a defendant is to live or die.

Finally, the Briggs Instruction impermissibly invites jurors to impose death sentences on the basis of their desire to foreclose a duly authorized review of their judgment of conviction. Although the power to grant clemency is not restricted by standards, it is reasonable to assume that it will at least be exercised when the Governor concludes that "the criminal justice system has unjustly convicted a defendant." *Roberts* v. *Louisiana*, 428 U. S. 325, 350 (1976) (WHITE, J., joined by BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., dissenting). Yet the very jury whose judgment of conviction would be the subject of any future application for clemency is led to believe that it may impose the death sentence to preclude such an application.[10] I am aware of no authority, and the majority cites none, for the proposition that a judicial body may base any decision, no less one concerning the life or death of an individual, on a desire to immunize its own actions from duly authorized reexamination.[11]

V

The conclusion that juries should not be permitted to consider commutation and parole in deciding the appropriate sentence is shared by nearly every jurisdiction which has considered the question. In prior decisions this Court has consistently sought "guidance . . . from the objective evidence of the country's present judgment" in determining the constitutionality of particular capital sentencing schemes. *Coker* v. *Georgia*, 433 U. S. 584, 593 (1977). See, *e. g.*, *Solem* v. *Helm*, *ante*, at 290–292; *Enmund*, 458 U. S., at 812–816 (O'CONNOR, J., dissenting); *Beck* v. *Alabama*, *supra*, at 637; *Gregg* v. *Georgia*, 428 U. S., at 179–182; *Woodson* v. *North Carolina*, 428 U. S., at 294–299. With scarcely a word of explanation, today's decision dismisses the overwhelming weight of authority establishing that a jury may not be informed of the possibility that a defendant may be released if he is not sentenced to death.

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[10] It matters not that the jury in California cannot actually eliminate the possibility of commutation because a death sentence may be commuted as well. The Briggs Instruction omits any mention of this fact, and, as the majority acknowledges, *ante*, at 1011–1012, there exist compelling reasons why a defendant would not wish to and should not be forced to bring it to the jury's attention. See n. 3, *supra*.

[11] State courts have consistently held that juries may not be permitted to circumvent the actions of other branches of government through the preemptive imposition of the death penalty. See, *e. g.*, *Murray* v. *State*, 359 So. 2d 1178 (Ala. Crim. App. 1978) (consideration of commutation subverts jury's properly assigned role); *Andrews* v. *State*, 251 Ark. 279, 290, 472 S. W. 2d 86, 92 (1971) (consideration of commutation takes jury "far afield from its proper purpose and prerogative"); *Broyles* v. *Commonwealth*, 267 S. W. 2d 73, 76 (Ky. 1954) (when jury anticipates acts of executive branch it "circumvent[s] . . . and infringes upon [their] prerogatives"); *State* v. *Lindsey*, 404 So. 2d, at 486–487 (jury would improperly pre-empt the Governor's duly authorized power); *Jones* v. *Commonwealth*, 194 Va. 273, 279, 72 S. E. 2d 693, 697 (1952).

The propriety of allowing a sentencing jury to consider the power of a Governor to commute a sentence or of a parole board to grant parole has been considered in 28 jurisdictions in addition to California.[12] Of those jurisdictions, 25 have concluded, as did the California Supreme Court in this case, that the jury should not consider the possibility of pardon, parole, or commutation.[13] In only three jurisdictions has it been deemed proper to allow a jury to consider the possibility that a sentence can be reduced by commutation or parole, and two of those cases[14] were decided before *Furman* v. *Georgia*, 408 U. S. 238 (1972). Only one post-*Furman* decision has approved of jury consideration of parole or commutation,[15] and that decision concerned a capital sentencing scheme in which the jury merely recommends the sentence. Moreover, not only has the view embraced by the majority been almost uniformly rejected, but in those States which formerly permitted jury consideration of parole and commutation the trend has been to renounce the prior decisions.[16]

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[12] California is the only State which has a statute requiring that the jury be instructed to consider the possibility of commutation. In other jurisdictions, the issue has generally arisen either because the jury inquired about parole or commutation or because the defendant contended that the prosecution improperly argued the issue to the jury.

[13] Most of these decisions concern jury sentencing in capital cases, although some concern noncapital cases. While some decisions have found the error harmless, in none of these cases did a court find a jury instruction concerning parole or commutation to be harmless. See, *e. g.*, *Grady* v. *State*, 391 So. 2d 1095 (Ala. Crim. App. 1980) (noncapital); *Westbrook* v. *State*, 265 Ark. 736, 580 S. W. 2d 702 (1979); *Jones* v. *State*, 146 Colo. 40, 360 P. 2d 686 (1961); *Smith* v. *State*, 317 A. 2d 20 (Del. 1974); *Paramore* v. *State*, 229 So. 2d 855 (Fla. 1969) (prosecutor argument improper but not reversible error), vacated on other grounds, 408 U. S. 935 (1972); *Gilreath* v. *State*, 247 Ga. 814, 279 S. E. 2d 650 (1981), cert. denied, 456 U. S. 984 (1982); *People* v. *Szabo*, 94 Ill. 2d 327, 447 N. E. 2d 193 (1983); *Farmer* v. *Commonwealth*, 450 S. W. 2d 494 (Ky. 1970); *State* v. *Brown*, 414 So. 2d 689 (La. 1982); *Poole* v. *State*, 295 Md. 167, 453 A. 2d 1218 (1983); *State* v. *Thomas*, 625 S. W. 2d 115 (Mo. 1981); *Grandsinger* v. *State*, 161 Neb. 419, 73 N. W. 2d 632 (1955) (prosecutorial argument improper but not reversible error), cert. denied, 352 U. S. 880 (1956); *Summers* v. *State*, 86 Nev. 210, 213, 467 P. 2d 98, 100 (1970) (reaffirming *Serrano* v. *State*, 86 Nev. 676, 447 P. 2d 497 (1968), which instructed jury to assume that life without parole means exactly that); *State* v. *Conklin*, 54 N. J. 540, 258 A. 2d 1 (1969); *State* v. *Jones*, 296 N. C. 495, 251 S. E. 2d 425 (1979); *McKee* v. *State*, 576 P. 2d 302 (Okla. Crim. App. 1978) (noncapital); *State* v. *Leland*, 190 Ore. 598, 227 P. 2d 785 (1951), aff'd, 343 U. S. 790 (1952); *Commonwealth* v. *Aljoe*, 420 Pa. 198, 216 A. 2d 50 (1966); *State* v. *Goolsby*, 275 S. C. 110, 268 S. E. 2d 31, cert. denied, 449 U. S. 1037 (1980); *Farris* v.

I would have thought that this impressive consensus would "weigh heavily in the balance" in determining the constitutionality of the Briggs Instruction. *Enmund* v. *Florida*, *supra*, at 797. The majority breezily dismisses that consensus with the terse statement that "States are free to provide

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State, 535 S. W. 2d 608 (Tenn. 1976) (noncapital); *Clanton* v. *State*, 528 S. W. 2d 250 (Tex. Crim. App. 1975); *Clanton* v. *Commonwealth*, 223 Va. 41, 286 S. E. 2d 172 (1982); *State* v. *Todd*, 78 Wash. 2d 362, 474 P. 2d 542 (1970); *State* v. *Lindsey*, 160 W. Va. 284, 233 S. E. 2d 734 (1977) (noncapital); *State* v. *Carroll*, 52 Wyo. 29, 69 P. 2d 542 (1937). Contrary to the majority's suggestion, *ante*, at 1013–1014, n. 30, these decisions rest on much broader grounds than the interpretation of particular state statutes.

[14] *Massa* v. *State*, 37 Ohio App. 532, 538–539, 175 N. E. 219, 221–222 (1930); *State* v. *Jackson*, 100 Ariz. 91, 412 P. 2d 36 (1966).

[15] *Brewer* v. *State*, 275 Ind. 338, 417 N. E. 2d 889 (1981).

[16] In 1955, for instance, the Georgia Legislature overruled prior decisions to the contrary by enacting a statute forbidding any jury argument concerning commutation or parole. Ga. Code Ann. § 27–2206 (1972). See *Strickland* v. *State*, 209 Ga. 65, 70 S. E. 2d 710 (1952) (cases discussed therein). In 1958 the New Jersey Supreme Court reversed a line of decisions which had approved of jury consideration of commutation and parole. *State* v. *White*, 27 N. J. 158, 142 A. 2d 65 (1958). And in 1976 the Tennessee Supreme Court invalidated a statute that required juries to be instructed about parole in felony cases. *Farris* v. *State*, *supra*. See also *Andrews* v. *State*, 251 Ark. 279, 472 S. W. 2d 86 (1971) (disapproving earlier decisions permitting judge, when asked by jurors, to inform them of possibility of reduction of sentence).

greater protections . . . than the Federal Constitution requires." *Ante*, at 1014. This observation hardly suffices as an explanation, however, since the same thing could have been said in *Enmund*, *Coker*, *Beck*, and *Woodson*, yet in each of those decisions the Court looked to prevailing standards for guidance.

The majority's approach is inconsistent with the compelling reasons for according "due regard," *Coker* v. *Georgia*, 433 U. S., at 592, to the contemporary judgments of other jurisdictions. This Court has stressed that the "[Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion), and that "[c]entral to the application of the Amendment is a determination of contemporary standards regarding the infliction of punishment." *Woodson* v. *North Carolina*, 428 U. S., at 288 (opinion of Stewart, POWELL, and STEVENS, JJ.). Moreover, unless this Court's judgment is "informed by objective factors to the maximum possible extent," its decisions may reflect "merely the subjective views of individual Justices." *Coker*, *supra*, at 592 (plurality opinion).

VI

Whatever interest a State may have in imposing the death penalty, there is no justification for a misleading instruction obviously calculated to increase the likelihood of a death sentence by inviting the jury to speculate about the possibility that the defendant will eventually be released if he is not executed. I would vacate respondent's death sentence.

JUSTICE BLACKMUN, dissenting.

I join Parts II through V of JUSTICE MARSHALL's opinion in dissent.

I had understood the issue in this case to be whether a State constitutionally may instruct a jury about the Governor's power to commute a sentence of life without parole. That issue involves jury consideration of the probability of action by the incumbent Governor or by future Governors. Instead, the Court, on its own, redefines the issue in terms of the dangerousness of the respondent, an issue that involves jury consideration of the probability that respondent will commit acts of violence in the future. *Ante*, at 1002-1003. As both JUSTICE MARSHALL, *ante*, at 1018-1019, and JUSTICE STEVENS, *post*, at 1030, so forcefully point out, the two questions do not relate to each other. Neither the State of California nor the solitary dissenter in the State's Supreme Court ventured such an argument.

The issue actually presented is an important one, and there may be arguments supportive of the instruction. The Court, however, chooses to present none. Instead, it approves the Briggs Instruction by substituting an intellectual sleight of hand for legal analysis. This kind of appellate review compounds the original unfairness of the instruction itself, and thereby does the rule of law disservice. I dissent.

JUSTICE STEVENS, dissenting.

No rule of law required the Court to hear this case. We granted certiorari only because at least four Members of the Court determined—as a matter of discretion—that review of the constitutionality of the so-called Briggs Instruction would represent a wise use of the Court's scarce resources.

When certiorari was granted in this case, the Court had been informed by the respondent that the Briggs Instruction is unique: "Only California requires that juries be instructed selectively on the Governor's power to commute life without parole sentences." Further, the Court had been informed, accurately, that the overwhelming number of jurisdictions condemn any comment whatsoever in a capital case on the Governor's power to commute. That statement was followed by a half-page list of citations to state-court decisions. Brief in Opposition 6–7. See *ante*, at 1026–1027 (JUSTICE MARSHALL, dissenting). These facts shed an illuminating light on the Court's perception of how its discretion should be exercised.

Even if one were to agree with the Court's conclusion that the instruction does not violate the defendant's procedural rights, it would nevertheless be fair to ask what harm would have been done to the administration of justice by state courts if the California court had been left undisturbed in its determination. It is clear that omission of the instruction could not conceivably prejudice the prosecutor's legitimate interests. Surely if the character of an offense and the character of the offender are such that death is the proper penalty, the omission of a comment on the Governor's power to commute a life sentence would not preclude the jury from returning the proper verdict. If it were true that this instruction may make the difference between life and death in a case in which the scales are otherwise evenly balanced, that is a reason why the instruction should not be given—not a reason for giving it. For the existence of the rarely exercised power of commutation has absolutely nothing to do with the defendant's culpability or his capacity for rehabilitation. The Governor's power to commute is entirely different from any relevant aggravating circumstance that may legitimately impel the jury toward voting for the death penalty. See *ante*, at 1012. The Briggs Instruction has no greater justification than an instruction to the jury that if the scales are evenly balanced, you should remember that more murders have been committed by people whose names begin with the initial "S" than with any other letter.

No matter how trivial the impact of the instruction may be, it is fundamentally wrong for the presiding judge at the trial—who should personify the evenhanded administration of justice—to tell the jury, indirectly to be sure, that doubt concerning the proper penalty should be resolved in favor of the most certain method of preventing the defendant from ever walking the streets again.

The Court concludes its opinion by solemnly noting that we "sit as judges, not as legislators, and the wisdom of the decision to permit juror consideration of possible commutation is

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best left to the States." *Ante*, at 1014. Why, I ask with all due respect, did not the Justices who voted to grant certiorari in this case allow the wisdom of state judges to prevail in California, especially when they have taken a position consistent with those of state judges in Alabama, Arkansas, Colorado, Delaware, Florida, Georgia, Illinois, Kentucky, Louisiana, Maryland, Missouri, Nebraska, Nevada, New Jersey, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, and Wyoming?

I repeat, no rule of law commanded the Court to grant certiorari. No other State would have been required to follow the California precedent if it had been permitted to stand. Nothing more than an interest in facilitating the imposition of the death penalty in California justified this Court's exercise of its discretion to review the judgment of the California Supreme Court. That interest, in my opinion, is not sufficient to warrant this Court's review of the validity of a jury instruction when the wisdom of giving that instruction is plainly a matter that is best left to the States.

For the reasons stated in Parts II to V of JUSTICE MARSHALL's opinion, I disagree with the Court's decision on the merits. But even if the Court were correct on the merits, I would still firmly disagree with its decision to grant certiorari. I therefore respectfully dissent.

MICHIGAN *v.* LONG

CERTIORARI TO THE SUPREME COURT OF MICHIGAN

No. 82–256. Argued February 23, 1983—Decided July 6, 1983

Two police officers, patrolling in a rural area at night, observed a car traveling erratically and at excessive speed. When the car swerved into a ditch, the officers stopped to investigate and were met by respondent, the only occupant of the car, at the rear of the car. Respondent, who "appeared to be under the influence of something," did not respond to initial requests to produce his license and registration, and when he began walking toward the open door of the car, apparently to obtain the registration, the officers followed him and saw a hunting knife on the floorboard of the driver's side of the car. The officers then stopped respondent and subjected him to a patdown search, which revealed no weapons. One of the officers shined his flashlight into the car, saw something protruding from under the armrest on the front seat, and upon lifting the armrest saw an open pouch that contained what appeared to be marihuana. Respondent was then arrested for possession of marihuana. A further search of the car's interior revealed no more contraband, but the officers decided to impound the vehicle and more marihuana was found in the trunk. The Michigan state trial court denied respondent's motion to suppress the marihuana taken from both the car's interior and its trunk, and he was convicted of possession of marihuana. The Michigan Court of Appeals affirmed, holding that the search of the passenger compartment was valid as a protective search under *Terry* v. *Ohio*, 392 U. S. 1, and that the search of the trunk was valid as an inventory search under *South Dakota* v. *Opperman*, 428 U. S. 364. However, the Michigan Supreme Court reversed, holding that *Terry* did not justify the passenger compartment search, and that the marihuana found in the trunk was the "fruit" of the illegal search of the car's interior.

Held:

1. This Court does not lack jurisdiction to decide the case on the asserted ground that the decision below rests on an adequate and independent state ground. Because of respect for the independence of state courts and the need to avoid rendering advisory opinions, this Court, in determining whether state court references to state law constitute adequate and independent state grounds, will no longer look beyond the opinion under review, or require state courts to reconsider cases to clarify the grounds of their decisions. Accordingly, when a state court decision fairly appears to rest primarily on federal law, or to be interwoven

with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, this Court will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent state grounds, this Court will not undertake to review the decision. In this case, apart from two citations to the State Constitution, the court below relied *exclusively* on its understanding of *Terry* and other federal cases. Even if it is accepted that the Michigan Constitution has been interpreted to provide independent protection for certain rights also secured under the Fourth Amendment, it fairly appears that the Michigan Supreme Court rested its decision primarily on federal law. Pp. 1037–1044.

2. The protective search of the passenger compartment of respondent's car was reasonable under the principles articulated in *Terry* and other decisions of this Court. Although *Terry* involved the stop and subsequent patdown search for weapons of a person suspected of criminal activity, it did *not* restrict the preventive search to the person of the detained suspect. Protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger. Roadside encounters between police and suspects are especially hazardous, and danger may arise from the possible presence of weapons in the area surrounding a suspect. Thus, the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer to believe that the suspect is dangerous and the suspect may gain immediate control of weapons. If, while conducting a legitimate *Terry* search of an automobile's interior, the officer discovers contraband other than weapons, he cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances. The circumstances of this case justified the officers in their reasonable belief that respondent posed a danger if he were permitted to reenter his vehicle. Nor did they act unreasonably in taking preventive measures to ensure that there were no other weapons within respondent's immediate grasp before permitting him to reenter his automobile. The fact that respondent was under the officers' control during the investigative stop does not render unreasonable their belief that he could injure them. Pp. 1045–1052.

3. Because the Michigan Supreme Court suppressed the marihuana taken from the trunk as a fruit of what it erroneously held was an illegal

search of the car's interior, the case is remanded to enable it to determine whether the trunk search was permissible under *Opperman*, *supra*, or other decisions of this Court. P. 1053.

413 Mich. 461, 320 N. W. 2d 866, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined, and in Parts I, III, IV, and V of which BLACKMUN, J., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 1054. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 1054. STEVENS, J., filed a dissenting opinion, *post*, p. 1065.

Louis J. Caruso, Solicitor General of Michigan, argued the cause for petitioner. With him on the brief were *Frank J. Kelley*, Attorney General, and *Leonard J. Malinowski*, Assistant Attorney General.

David A. Strauss argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Jensen*, and *Deputy Solicitor General Frey*.

James H. Geary argued the cause for respondent. With him on the brief was *Joseph J. Jerkins*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

In *Terry* v. *Ohio*, 392 U. S. 1 (1968), we upheld the validity of a protective search for weapons in the absence of probable cause to arrest because it is unreasonable to deny a police officer the right "to neutralize the threat of physical harm," *id.*, at 24, when he possesses an articulable suspicion that an individual is armed and dangerous. We did not, however, expressly address whether such a protective search for weapons could extend to an area beyond the person in the absence of probable cause to arrest. In the present case, respondent David Long was convicted for possession of marihuana found by police in the passenger compartment and trunk of the automobile that he was driving. The police searched the passenger compartment because they had reason to believe that the vehicle contained weapons potentially dangerous to the officers. We hold that the protective search of the passenger compartment was reasonable under the principles articulated in *Terry* and other decisions of this Court. We also examine Long's argument that the decision below rests upon an adequate and independent state ground, and we decide in favor of our jurisdiction.

**David Crump*, *Wayne W. Schmidt*, and *James P. Manak* filed a brief for the Gulf & Great Plains Legal Foundation of America et al. as *amici curiae* urging reversal.

I

Deputies Howell and Lewis were on patrol in a rural area one evening when, shortly after midnight, they observed a car traveling erratically and at excessive speed.[1] The officers observed the car turning down a side road, where it swerved off into a shallow ditch. The officers stopped to investigate. Long, the only occupant of the automobile, met the deputies at the rear of the car, which was protruding from the ditch onto the road. The door on the driver's side of the vehicle was left open.

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[1] It is clear, and the respondent concedes, that if the officers had arrested Long for speeding or for driving while intoxicated, they could have searched the passenger compartment under *New York* v. *Belton*, 453 U. S. 454 (1981), and the trunk under *United States* v. *Ross*, 456 U. S. 798 (1982), if they had probable cause to believe that the trunk contained contraband. See Tr. of Oral Arg. 41. However, at oral argument, the State informed us that while Long could have been arrested for a speeding violation under Michigan law, he was *not* arrested because "[a]s a matter of practice," police in Michigan do not arrest for speeding violations unless "more" is involved. See *id.*, at 6. The officers did issue Long an appearance ticket. The petitioner also confirmed that the officers could have arrested Long for driving while intoxicated but they "would have to go through a process to make a determination as to whether the party is intoxicated and then go from that point." *Ibid.*

The court below treated this case as involving a protective search, and not a search justified by probable cause to arrest for speeding, driving while intoxicated, or any other offense. Further, the petitioner does not argue *that* if probable cause to arrest exists, but the officers do not actually effect the arrest, the police may nevertheless conduct a search as broad as those authorized by *Belton* and *Ross*. Accordingly, we do not address that issue.

Deputy Howell requested Long to produce his operator's license, but he did not respond. After the request was repeated, Long produced his license. Long again failed to respond when Howell requested him to produce the vehicle registration. After another repeated request, Long, who Howell thought "appeared to be under the influence of something," 413 Mich. 461, 469, 320 N. W. 2d 866, 868 (1982), turned from the officers and began walking toward the open door of the vehicle. The officers followed Long and both observed a large hunting knife on the floorboard of the driver's side of the car. The officers then stopped Long's progress and subjected him to a *Terry* protective patdown, which revealed no weapons.

Long and Deputy Lewis then stood by the rear of the vehicle while Deputy Howell shined his flashlight into the interior of the vehicle, but did not actually enter it. The purpose of Howell's action was "to search for other weapons." 413 Mich., at 469, 320 N. W. 2d, at 868. The officer noticed that something was protruding from under the armrest on the front seat. He knelt in the vehicle and lifted the armrest. He saw an open pouch on the front seat, and upon flashing his light on the pouch, determined that it contained what appeared to be marihuana. After Deputy Howell showed the pouch and its contents to Deputy Lewis, Long was arrested for possession of marihuana. A further search of the interior of the vehicle, including the glovebox, revealed neither more contraband nor the vehicle registration. The officers decided to impound the vehicle. Deputy Howell opened the trunk, which did not have a lock, and discovered inside it approximately 75 pounds of marihuana.

The Barry County Circuit Court denied Long's motion to suppress the marihuana taken from both the interior of the car and its trunk. He was subsequently convicted of possession of marihuana. The Michigan Court of Appeals affirmed Long's conviction, holding that the search of the passenger compartment was valid as a protective search under *Terry*, *supra*, and that the search of the trunk was valid as an inventory search under *South Dakota* v. *Opperman*, 428 U. S. 364 (1976). See 94 Mich. App. 338, 288 N. W. 2d 629 (1979). The Michigan Supreme Court reversed. The court held that "the sole justification of the *Terry* search, protection of the police officers and others nearby, cannot justify the search in this case." 413 Mich., at 472, 320 N. W. 2d, at 869. The marihuana found in Long's trunk was considered by the court below to be the "fruit" of the illegal search of the interior, and was also suppressed.[2]

We granted certiorari in this case to consider the important question of the authority of a police officer to protect himself by conducting a *Terry*-type search of the passenger compartment of a motor vehicle during the lawful investigatory stop of the occupant of the vehicle. 459 U. S. 904 (1982).

II

Before reaching the merits, we must consider Long's argument that we are without jurisdiction to decide this case because the decision below rests on an adequate and independent state ground. The court below referred twice to the State Constitution in its opinion, but otherwise relied exclusively on federal law.[3] Long argues that the Michigan courts have provided greater protection from searches and seizures under the State Constitution than is afforded under the Fourth Amendment, and the references to the State Constitution therefore establish an adequate and independent ground for the decision below.

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[2] Chief Justice Coleman dissented, arguing that *Terry* v. *Ohio*, 392 U. S. 1 (1968), authorized the area search, and that the trunk search was a valid inventory search. See 413 Mich., at 473–480, 320 N. W. 2d, at 870–873. Justice Moody concurred in the result on the ground that the trunk search was improper. He agreed with Chief Justice Coleman that the interior search was proper under *Terry*. See 413 Mich., at 480–486, 320 N. W. 2d, at 873–875.

[3] On the first occasion, the court merely cited in a footnote both the State and Federal Constitutions. See *id.*, at 471, n. 4, 320 N. W. 2d, at 869, n. 4. On the second occasion, at the conclusion of the opinion, the court stated: "We hold, therefore, that the deputies' search of the vehicle was proscribed by the Fourth Amendment to the United States Constitution and art. 1, § 11 of the Michigan Constitution." *Id.*, at 472–473, 320 N. W. 2d, at 870.

It is, of course, "incumbent upon this Court . . . to ascertain for itself . . . whether the asserted non-federal ground independently and adequately supports the judgment." *Abie State Bank* v. *Bryan*, 282 U. S. 765, 773 (1931). Although we have announced a number of principles in order to help us determine whether various forms of references to state law constitute adequate and independent state grounds,[4] we openly admit that we have thus far not developed a satisfying and consistent approach for resolving this vexing issue. In some instances, we have taken the strict view that if the ground of decision was at all unclear, we would dismiss the case. See, *e. g.*, *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52 (1934). In other instances, we have vacated, see, *e. g.*, *Minnesota* v. *National Tea Co*, 309 U. S. 551 (1940), or continued a case, see, *e. g.*, *Herb* v. *Pitcairn*, 324 U. S. 117 (1945), in order to obtain clarification about the nature of a state court decision. See also *California* v. *Krivda*, 409 U. S. 33 (1972). In more recent cases, we have ourselves examined state law to determine whether state courts have used federal law to guide their application of state law or to provide the actual basis for the decision that was reached. See *Texas* v. *Brown*, 460 U. S. 730, 732–733, n. 1 (1983) (plurality opinion). Cf. *South Dakota* v. *Neville*, 459 U. S. 553, 569 (1983) (STEVENS, J., dissenting). In *Oregon* v. *Kennedy*, 456 U. S. 667, 670–671 (1982), we rejected an invitation to remand to the state court for clarification even when the decision rested in part on a case from the state court, because we determined that the state case itself rested upon federal grounds. We added that "[e]ven if the case admitted of more doubt as to whether federal and state grounds for decision were intermixed, the fact that the state court relied to the extent it did on federal grounds requires us to reach the merits." *Id.*, at 671.

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[4] For example, we have long recognized that "where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210 (1935). We may review a state case decided on a federal ground even if it is clear that there was an available state ground for decision on which the state court could properly have relied. *Beecher* v. *Alabama*, 389 U. S. 35, 37, n. 3 (1967). Also, if, in our view, the state court "'felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did,'" then we will not treat a normally adequate state ground as independent, and there will be no question about our jurisdiction. *Delaware* v. *Prouse*, 440 U. S. 648, 653 (1979) (quoting *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 568 (1977)). See also *South Dakota* v. *Neville*, 459 U. S. 553, 556–557, n. 3 (1983). Finally, "where the non-federal ground is so interwoven with the [federal ground] as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain." *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164 (1917).

This ad hoc method of dealing with cases that involve possible adequate and independent state grounds is antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved. Moreover, none of the various methods of disposition that we have employed thus far recommends itself as the preferred method that we should apply to the exclusion of others, and we therefore determine that it is appropriate to reexamine our treatment of this jurisdictional issue in order to achieve the consistency that is necessary.

The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar, and which often, as in this case, have not been discussed at length by the parties. Vacation and continuance for clarification have also been unsatisfactory both because of the delay and decrease in efficiency of judicial administration, see *Dixon* v. *Duffy*, 344 U. S. 143 (1952),[5] and, more important, because these methods of disposition place significant burdens on state courts to demonstrate the presence or absence of our jurisdiction. See *Philadelphia Newspapers, Inc.* v. *Jerome*, 434 U. S. 241, 244 (1978) (REHNQUIST, J., dissenting); *Department of Motor Vehicles* v. *Rios*, 410 U. S. 425, 427 (1973) (Douglas, J., dissenting). Finally, outright dismissal of cases is clearly not a panacea because it cannot be doubted that there is an important need for uniformity in federal law, and that this need goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds and where the *independence* of an alleged state ground is not apparent from the four corners of the opinion. We have long recognized that dismissal is inappropriate "where there is strong indication . . . that the federal constitution as judicially construed controlled the decision below." *National Tea Co.*, *supra*, at 556.

Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions. Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

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[5] Indeed, *Dixon* v. *Duffy* is also illustrative of another difficulty involved in our requiring state courts to reconsider their decisions for purposes of clarification. In *Dixon*, we continued the case on two occasions in order to obtain clarification, but none was forthcoming: "[T]he California court advised petitioner's counsel informally that it doubted its jurisdiction to render such a determination." 344 U. S., at 145. We then vacated the judgment of the state court, and remanded.

This approach obviates in most instances the need to examine state law in order to decide the nature of the state court decision, and will at the same time avoid the danger of our rendering advisory opinions.[6] It also avoids the unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court. We believe that such an approach will provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law. "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *National Tea Co.*, *supra*, at 557.

The principle that we will not review judgments of state courts that rest on adequate and independent state grounds is based, in part, on "the limitations of our own jurisdiction." *Herb* v. *Pitcairn*, 324 U. S. 117, 125 (1945).[7] The jurisdictional concern is that we not "render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Id.*, at 126. Our requirement of a "plain statement" that a decision rests upon adequate and independent state grounds does not in any way authorize the rendering of advisory opinions. Rather, in determining, as we must, whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds, see *Abie State Bank* v. *Bryan*, 282 U. S., at 773, we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.[8]

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[6] There may be certain circumstances in which clarification is necessary or desirable, and we will not be foreclosed from taking the appropriate action.

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[7] In *Herb* v. *Pitcairn*, 324 U. S., at 128, the Court also wrote that it was desirable that state courts "be asked rather than told what they have intended." It is clear that we have already departed from that view in those cases in which we have examined state law to determine whether a particular result was guided or compelled by federal law. Our decision today departs further from *Herb* insofar as we disfavor further requests to state courts for clarification, and we require a clear and express statement that a decision rests on adequate and independent state grounds. However, the "plain statement" rule protects the integrity of state courts for the reasons discussed above. The preference for clarification expressed in *Herb* has failed to be a completely satisfactory means of protecting the state and federal interests that are involved.

[8] It is not unusual for us to employ certain presumptions in deciding jurisdictional issues. For instance, although the petitioner bears the burden of establishing our jurisdiction, *Durley* v. *Mayo*, 351 U. S. 277, 285 (1956), we have held that the party who alleges that a controversy before us has become moot has the "heavy burden" of establishing that we lack jurisdiction. *County of Los Angeles* v. *Davis*, 440 U. S. 625, 631 (1979). That is, we presume in those circumstances that we have jurisdiction until some party establishes that we do not for reasons of mootness.

We also note that the rule that we announce today was foreshadowed by our opinions in *Delaware* v. *Prouse*, 440 U. S. 648 (1979), and *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562 (1977). In these cases, Our review of the decision below under this framework leaves us unconvinced that it rests upon an independent state ground. Apart from its two citations to the State Constitution, the court below relied *exclusively* on its understanding of *Terry* and other federal cases. Not a single state case was cited to support the state court's holding that the search of the passenger compartment was unconstitutional.[9] Indeed,

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the state courts relied on both state and federal law. We determined that we had jurisdiction to decide the cases because our reading of the opinions led us to conclude that each court "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." *Zacchini, supra,* at 568; *Delaware, supra,* at 653. In *Delaware,* we referred to prior state decisions that confirmed our understanding of the opinion in that case, but our primary focus was on the face of the opinion. In *Zacchini,* we relied entirely on the syllabus and opinion of the state court.

In dissent, JUSTICE STEVENS proposes the novel view that this Court should never review a state court decision unless the Court wishes to vindicate a federal right that has been endangered. The rationale of the dissent is not restricted to cases where the decision is arguably supported by adequate and independent state grounds. Rather, JUSTICE STEVENS appears to believe that even if the decision below rests exclusively on federal grounds, this Court should not review the decision as long as there is no federal right that is endangered.

The state courts handle the vast bulk of all criminal litigation in this country. In 1982, more than 12 million criminal actions (excluding juvenile and traffic charges) were filed in the 50 state court systems and the District of Columbia. See 7 State Court Journal, No. 1, p. 18 (1983). By comparison, approximately 32,700 criminal suits were filed in federal courts during that same year. See Annual Report of the Director of the Administrative Office of the United States Courts 6 (1982). The state courts are required to apply federal constitutional standards, and they necessarily create a considerable body of "federal law" in the process. It is not surprising that this Court has become more interested in the application and development of federal law by state courts in the light of the recent significant expansion of federally created standards that we have imposed on the States.

[9] At oral argument, Long argued that the state court relied on its decision in *People* v. *Reed,* 393 Mich. 342, 224 N. W. 2d 867, cert. denied, 422 U. S. 1044 (1975). See Tr. of Oral Arg. 29. However, the court cited that case only in the context of a statement that the State did not seek to justify the search in this case "by reference to other exceptions to the war-

the court declared that the search in this case was unconstitutional because "[t]he Court of Appeals erroneously applied the principles of *Terry* v. *Ohio* . . . to the search of the interior of the vehicle in this case." 413 Mich., at 471, 320 N. W. 2d, at 869. The references to the State Constitution in no way indicate that the decision below rested on grounds in any way *independent* from the state court's interpretation of federal law. Even if we accept that the Michigan Constitution has been interpreted to provide independent protection for certain rights also secured under the Fourth Amendment, it fairly appears in this case that the Michigan Supreme Court rested its decision primarily on federal law.

Rather than dismissing the case, or requiring that the state court reconsider its decision on our behalf solely because of a mere possibility that an adequate and independent ground supports the judgment, we find that we have jurisdiction in the absence of a plain statement that the decision below rested on an adequate and independent state ground. It appears to us that the state court "felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did." *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 568 (1977).[10]

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rant requirement." 413 Mich., at 472, 320 N. W. 2d, at 869–870 (footnote omitted). The court then noted that *Reed* held that "'[a] warrantless search and seizure is unreasonable per se and violates the Fourth Amendment of the United States Constitution and Art. 1, § 11 of the state constitution unless shown to be within one of the exceptions to the rule.'" 413 Mich., at 472–473, n. 8, 320 N. W. 2d, at 870, n. 8.

[10] There is nothing unfair about requiring a plain statement of an independent state ground in this case. Even if we were to rest our decision on an evaluation of the state law relevant to Long's claim, as we have sometimes done in the past, our understanding of Michigan law would also result in our finding that we have jurisdiction to decide this case. Under state search-and-seizure law, a "higher standard" is imposed under Art. 1, § 11, of the 1963 Michigan Constitution. See *People* v. *Secrest*, 413 Mich. 521, 525, 321 N. W. 2d 368, 369 (1982). If, however, the item seized is, *inter*

III

The court below held, and respondent Long contends, that Deputy Howell's entry into the vehicle cannot be justified under the principles set forth in *Terry* because "*Terry* authorized only a limited pat-down search of a *person* suspected of criminal activity" rather than a search of an area. 413

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alia, a "narcotic drug . . . seized by a peace officer outside the curtilage of any dwelling house in this state," Art. 1, § 11, of the 1963 Michigan Constitution, then the seizure is governed by a standard identical to that imposed by the Fourth Amendment. See *People* v. *Moore*, 391 Mich. 426, 435, 216 N. W. 2d 770, 775 (1974).

Long argues that under the current Michigan Comp. Laws § 333.7107 (1979), the definition of a "narcotic" does not include marihuana. The difficulty with this argument is that Long fails to cite any authority for the proposition that the term "narcotic" as used in the Michigan Constitution is dependent on current statutory definitions of that term. Indeed, it appears that just the opposite is true. The Michigan Supreme Court has held that constitutional provisions are presumed "to be interpreted in accordance with existing laws and legal usages of the time" of the passage of the provision. *Bacon* v. *Kent-Ottawa Authority*, 354 Mich. 159, 169, 92 N. W. 2d 492, 497 (1958). If the state legislature were able to change the interpretation of a constitutional provision by statute, then the legislature would have "the power of outright repeal of a duly-voted constitutional provision." *Ibid.* Applying these principles, the Michigan courts have held that a statute passed subsequent to the applicable state constitutional provision is not relevant for interpreting its Constitution, and that a definition in a legislative Act pertains only to that Act. *Jones* v. *City of Ypsilanti*, 26 Mich. App. 574, 182 N. W. 2d 795 (1970). See also *Walber* v. *Piggins*, 2 Mich. App. 145, 138 N. W. 2d 772 (1966), aff'd, 381 Mich. 138, 160 N. W. 2d 876 (1968). At the time that the 1963 Michigan Constitution was enacted, it is clear that marihuana was considered a narcotic drug. See 1961 Mich. Pub. Acts, No. 206, § 1(f). Indeed, it appears that marihuana was considered a narcotic drug in Michigan until 1978, when it was removed from the narcotic classification. We would conclude that the seizure of marihuana in Michigan is not subject to analysis under any "higher standard" than may be imposed on the seizure of other items. In the light of our holding in *Delaware* v. *Prouse*, 440 U. S. 648 (1979), that an interpretation of state law in our view compelled by federal constitutional considerations is not an independent state ground, we would have jurisdiction to decide the case.

Mich., at 472, 320 N. W. 2d, at 869 (footnote omitted). Brief for Respondent 10. Although *Terry* did involve the protective frisk of a person, we believe that the police action in this case is justified by the principles that we have already established in *Terry* and other cases.

In *Terry*, the Court examined the validity of a "stop and frisk" in the absence of probable cause and a warrant. The police officer in *Terry* detained several suspects to ascertain their identities after the officer had observed the suspects for a brief period of time and formed the conclusion that they were about to engage in criminal activity. Because the officer feared that the suspects were armed, he patted down the outside of the suspects' clothing and discovered two revolvers.

Examining the reasonableness of the officer's conduct in *Terry*,[11] we held that there is "'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" 392 U. S., at 21 (quoting *Camara* v. *Municipal Court*, 387 U. S. 523, 536–537 (1967)). Although the conduct of the officer in *Terry* involved a "severe, though brief, intrusion upon cherished personal security," 392 U. S., at 24–25, we found that the conduct was reasonable when we weighed the interest of the individual against the legitimate interest in "crime prevention and detection," *id.*, at 22, and the "need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest." *Id.*, at 24. When the officer has a reasonable belief "that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." *Ibid.*

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[11] Although we did not in any way weaken the warrant requirement, we acknowledged that the typical "stop and frisk" situation involves "an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Terry*, 392 U. S., at 20 (footnote omitted). We have emphasized that the propriety of a *Terry* stop and frisk is to be judged according to whether the officer acted as a "reasonably prudent man" in deciding that the intrusion was justified. *Id.*, at 27. "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Adams* v. *Williams*, 407 U. S. 143, 146 (1972).

Although *Terry* itself involved the stop and subsequent patdown search of a person, we were careful to note that "[w]e need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective search and seizure for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases." *Id.*, at 29. Contrary to Long's view, *Terry* need not be read as restricting the preventative search to the person of the detained suspect.[12]

In two cases in which we applied *Terry* to specific factual situations, we recognized that investigative detentions involving suspects in vehicles are especially fraught with danger to police officers. In *Pennsylvania* v. *Mimms*, 434 U. S. 106 (1977), we held that police may order persons out of an automobile during a stop for a traffic violation, and may frisk those persons for weapons if there is a reasonable belief that they are armed and dangerous. Our decision rested in part on the "inordinate risk confronting an officer as he approaches a person seated in an automobile." *Id.*, at 110. In *Adams* v. *Williams*, 407 U. S. 143 (1972), we held that the police, acting on an informant's tip, may reach into the passenger compartment of an automobile to remove a gun from a driver's waistband even where the gun was not apparent to police from outside the car and the police knew of its existence only because of the tip. Again, our decision rested in part on our view of the danger presented to police officers in "traffic stop" and automobile situations.[13]

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[12] As Chief Justice Coleman noted in her dissenting opinion in the present case:

"The opinion in *Terry* authorized the frisking of an overcoat worn by defendant because that was the issue presented by the facts. One could reasonably conclude that a different result would not have been constitutionally required if the overcoat had been carried, folded over the forearm, rather than worn. The constitutional principles stated in *Terry* would still control." 413 Mich., at 475–476, 320 N. W. 2d, at 871 (footnote omitted).

Finally, we have also expressly recognized that suspects may injure police officers and others by virtue of their access to weapons, even though they may not themselves be armed. In the Term following *Terry*, we decided *Chimel* v. *California*, 395 U. S. 752 (1969), which involved the limitations imposed on police authority to conduct a search incident to a valid arrest. Relying explicitly on *Terry*, we held that when an arrest is made, it is reasonable for the arresting officer to search "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." 395 U. S., at 763. We reasoned that "[a] gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested." *Ibid.* In *New York* v. *Belton*, 453 U. S. 454 (1981), we determined that the lower courts "have found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its recent occupant." *Id.*, at 460. In order to provide a "workable rule," *ibid.*, we held that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon' . . . ." *Ibid.* (quoting *Chimel*, *supra*, at 763). We also held that the police may examine the contents of any open or closed container found within the passenger compartment, "for if the passenger compartment is within the reach of the arrestee, so will containers in it be within his reach." 453 U. S., at 460 (footnote omitted). See also *Michigan* v. *Summers*, 452 U. S. 692, 702 (1981).

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[13] According to one study, "approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile. Bristow, Police Officer Shootings—A Tactical Evaluation, 54 J. Crim. L. C. & P. S. 93 (1963)." *Adams* v. *Williams*, *supra*, at 148, n. 3.

Our past cases indicate then that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect. These principles compel our conclusion that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.[14] See *Terry*, 392

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[14] We stress that our decision does not mean that the police may conduct automobile searches *whenever* they conduct an investigative stop, although the "bright line" that we drew in *Belton* clearly authorizes such a search whenever officers effect a custodial arrest. An additional interest exists in the arrest context, *i. e.*, preservation of evidence, and this justifies an "automatic" search. However, that additional interest does not exist in the *Terry* context. A *Terry* search, "unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime. . . . The sole justification of

U. S., at 21. "[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.*, at 27. If a suspect is "dangerous," he is no less dangerous simply because he is not arrested. If, while conducting a legitimate *Terry* search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances. *Coolidge* v. *New Hampshire*, 403 U. S. 443, 465 (1971); *Michigan* v. *Tyler*, 436 U. S. 499, 509 (1978); *Texas* v. *Brown*, 460 U. S., at 739 (plurality opinion by REHNQUIST, J.); *id.*, at 746 (POWELL, J., concurring in judgment).

The circumstances of this case clearly justified Deputies Howell and Lewis in their reasonable belief that Long posed a danger if he were permitted to reenter his vehicle. The hour was late and the area rural. Long was driving his automobile at excessive speed, and his car swerved into a ditch. The officers had to repeat their questions to Long, who appeared to be "under the influence" of some intoxicant. Long was not frisked until the officers observed that there was a large knife in the interior of the car into which Long was about to reenter. The subsequent search of the car was restricted to those areas to which Long would generally have immediate control, and that could contain a weapon. The trial court determined that the leather pouch containing

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the search . . . is the protection of the police officer and others nearby . . . ." 392 U. S., at 29. What we borrow now from *Chimel* v. *California*, 395 U. S. 752 (1969), and *Belton* is merely the recognition that part of the reason to allow area searches incident to an arrest is that the arrestee, who may not himself be armed, may be able to gain access to weapons to injure officers or others nearby, or otherwise to hinder legitimate police activity. This recognition applies as well in the *Terry* context. However, because the interest in collecting and preserving evidence is not present in the *Terry* context, we require that officers who conduct area searches during investigative detentions must do so only when they have the level of suspicion identified in *Terry*.

marihuana could have contained a weapon. App. 64a.[15] It is clear that the intrusion was "strictly circumscribed by the exigencies which justifi[ed] its initiation." *Terry, supra,* at 26.

In evaulating the validity of an officer's investigative or protective conduct under *Terry,* the "[t]ouchstone of our analysis . . . is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" *Pennsylvania* v. *Mimms,* 434 U. S., at 108–109 (quoting *Terry, supra,* at 19). In this case, the officers did not act unreasonably in taking preventive measures to ensure that there were no other weapons within Long's immediate grasp before permitting him to reenter his automobile. Therefore, the balancing required by *Terry* clearly weighs in favor of allowing the police to conduct an area search of the passenger compartment to uncover weapons, as long as they possess an articulable and objectively reasonable belief that the suspect is potentially dangerous.

The Michigan Supreme Court appeared to believe that it was not reasonable for the officers to fear that Long could injure them, because he was effectively under their control during the investigative stop and could not get access to any weapons that might have been located in the automobile. See 413 Mich., at 472, 320 N. W. 2d, at 869. This reasoning is mistaken in several respects. During any investigative detention, the suspect is "in the control" of the officers in the sense that he "may be briefly detained against his will . . . ." *Terry, supra,* at 34 (WHITE, J., concurring). Just as a *Terry* suspect on the street may, despite being under the brief control of a police officer, reach into his clothing and retrieve a weapon, so might a *Terry* suspect in Long's position break away from police control and retrieve a weapon from his automobile. See *United States* v. *Rainone,* 586 F. 2d 1132, 1134 (CA7 1978), cert. denied, 440 U. S. 980 (1979). In addition, if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside. *United States* v. *Powless*, 546 F. 2d 792, 795–796 (CA8), cert. denied, 430 U. S. 910 (1977). Or, as here, the suspect may be permitted to reenter the vehicle before the *Terry* investigation is over, and again, may have access to weapons. In any event, we stress that a *Terry* investigation, such as the one that occurred here, involves a police investigation "at close range," *Terry*, 392 U. S., at 24, when the officer remains particularly vulnerable in part *because* a full custodial arrest has not been effected, and the officer must make a "quick decision as to how to protect himself and others from possible danger . . . ." *Id.*, at 28. In such circumstances, we have not required that officers adopt alternative means to ensure their safety in order to avoid the intrusion involved in a *Terry* encounter.[16]

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[15] Of course, our analysis would apply to justify the search of Long's person that was conducted by the officers after the discovery of the knife.

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[16] Long makes a number of arguments concerning the invalidity of the search of the passenger compartment. The thrust of these arguments is that *Terry* searches are limited in scope and that an area search is fundamentally inconsistent with this limited scope. We have recognized that *Terry* searches are limited insofar as they may not be conducted in the absence of an articulable suspicion that the intrusion is justified, see, *e. g.*, *Sibron* v. *New York*, 392 U. S. 40, 65 (1968), and that they are protective in nature and limited to weapons, see *Ybarra* v. *Illinois*, 444 U. S. 85, 93–94 (1979). However, neither of these concerns is violated by our decision. To engage in an area search, which is limited to seeking weapons, the officer must have an articulable suspicion that the suspect is potentially dangerous.

Long also argues that there cannot be a legitimate *Terry* search based on the discovery of the hunting knife because Long possessed that weapon legally. See Brief for Respondent 17. Assuming, *arguendo*, that Long possessed the knife lawfully, we have expressly rejected the view that the validity of a *Terry* search depends on whether the weapon is possessed in accordance with state law. See *Adams* v. *Williams*, 407 U. S., at 146.

Contrary to JUSTICE BRENNAN's suggestion in dissent, the reasoning of *Terry*, *Chimel*, and *Belton* points clearly to the direction that we have taken today. Although *Chimel* involved a full custodial arrest, the rationale for *Chimel* rested on the recognition in *Terry* that it is unreasonable to prevent the police from taking reasonable steps to protect their safety.

IV

The trial court and the Court of Appeals upheld the search of the trunk as a valid inventory search under this Court's decision in *South Dakota* v. *Opperman*, 428 U. S. 364 (1976). The Michigan Supreme Court did not address this holding, and instead suppressed the marihuana taken from the trunk as a fruit of the illegal search of the interior of the automobile. Our holding that the initial search was justified under *Terry* makes it necessary to determine whether the trunk search was permissible under the Fourth Amendment. However, we decline to address this question because it was not passed upon by the Michigan Supreme Court, whose decision we review in this case. See *Cardinale* v. *Louisiana*, 394 U. S. 437, 438 (1969). We remand this issue to the court below, to enable it to determine whether the trunk search was permissible under *Opperman*, *supra*, or other decisions of this Court. See, *e. g.*, *United States* v. *Ross*, 456 U. S. 798 (1982).[17]

JUSTICE BRENNAN suggests that we are expanding the scope of a *Terry*-type search to include a search incident to a valid arrest. However, our opinion clearly indicates that the area search that we approve is limited to a search for weapons in circumstances where the officers have a reasonable belief that the suspect is potentially dangerous to them. JUSTICE BRENNAN quotes at length from *Sibron*, but fails to recognize that the search in that case was a search for narcotics, and not a search for weapons.

JUSTICE BRENNAN concedes that "police should not be exposed to unnecessary danger in the performance of their duties," *post*, at 1064, but then would require that police officers, faced with having to make quick determinations about self-protection and the defense of innocent citizens in the area, must also decide instantaneously what "less intrusive" alternative exists to ensure that any threat presented by the suspect will be neutralized. *Post*, at 1065. For the practical reasons explained in *Terry*, 392 U. S., at 24, 28, we have never required police to adopt alternative measures to avoid a legitimate *Terry*-type intrusion.

[17] Long suggests that the trunk search is invalid under state law. See Tr. of Oral Arg. 41, 43–44. The Michigan Supreme Court is, of course, free to determine the validity of that search under state law.

V

The judgment of the Michigan Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

I join Parts I, III, IV, and V of the Court's opinion. While I am satisfied that the Court has jurisdiction in this particular case, I do not join the Court, in Part II of its opinion, in fashioning a new presumption of jurisdiction over cases coming here from state courts. Although I agree with the Court that uniformity in federal criminal law is desirable, I see little efficiency and an increased danger of advisory opinions in the Court's new approach.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Court today holds that "the protective search of the passenger compartment" of the automobile involved in this case "was reasonable under the principles articulated in *Terry* and other decisions of this Court." *Ante*, at 1035. I disagree. *Terry* v. *Ohio*, 392 U. S. 1 (1968), does not support the Court's conclusion and the reliance on "other decisions" is patently misplaced. Plainly, the Court is simply continuing the process of distorting *Terry* beyond recognition and forcing it into service as an unlikely weapon against the Fourth Amendment's fundamental requirement that searches and seizures be based on probable cause. See *United States* v. *Place*, 462 U. S. 696, 714–717 (1983) (BRENNAN, J., concurring in result). I, therefore, dissent.[1]

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[1] I agree that the Court has jurisdiction to decide this case. See *ante*, at 1044–1045, n. 10.

On three occasions this Term I have discussed the limited scope of the exception to the probable-cause requirement created by *Terry* and its progeny. See *Florida* v. *Royer*, 460 U. S. 491, 509–511 (1983) (BRENNAN, J., concurring in result); *Kolender* v. *Lawson*, 461 U. S. 352, 364–365 (1983) (BRENNAN, J., concurring); *United States* v. *Place*, *supra*, at 711–717 (BRENNAN, J., concurring in result). I will not repeat those discussions here and note only that "*Terry*, and the cases that followed it, permit only brief investigative stops and extremely limited searches based on reasonable suspicion." 462 U. S., at 714. However, the Court's opinion compels a detailed review of *Terry* itself.

In *Terry*, the Court confronted the "quite narrow question" of "whether it is always unreasonable for a policeman to seize a person and subject him to a *limited* search for weapons unless there is probable cause for an arrest." 392 U. S., at 15 (emphasis supplied). Because the Court was dealing "with an entire rubric of police conduct . . . which historically [had] not been, and as a practical matter could not be, subjected to the warrant procedure," *id.*, at 20, the Court tested the conduct at issue "by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Ibid.* (footnote omitted). In considering the "reasonableness" of the conduct, the Court balanced "'the need to search [or seize] against the invasion which the search [or seizure] entails.'" *Id.*, at 21, quoting *Camara* v. *Municipal Court*, 387 U. S. 523, 534–535, 536–537 (1967). It deserves emphasis that in discussing the "invasion" at issue, the Court stated that "[e]ven *a limited search of the outer clothing for weapons* constitutes a severe, though brief, intrusion upon cherished personal security . . . ." 392 U. S., at 24–25 (emphasis supplied). Ultimately, the Court concluded that "there must be *a narrowly drawn authority* to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Id.*, at 27 (emphasis supplied). The Court expressed its holding as follows:

> "We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct *a carefully limited search of the outer clothing of such persons* in an attempt to discover weapons which might be used to assault him." *Id.*, at 30 (emphasis supplied).

It is clear that *Terry* authorized only limited searches of the person for weapons. In light of what *Terry* said, relevant portions of which the Court neglects to quote, the Court's suggestion that "*Terry* need not be read as restricting the preventive search to the person of the detained suspect," *ante*, at 1047 (footnote omitted), can only be described as disingenuous. Nothing in *Terry* authorized police officers to search a suspect's car based on reasonable suspicion. The Court confirmed this this very Term in *United States* v. *Place*, *supra*, where it described the search authorized by *Terry* as a "limited search for weapons, or 'frisk' . . . ." 462 U. S., at 702. The search at issue in this case is a far cry from a "frisk" and certainly was not "limited."[2]

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[2] Neither *Pennsylvania* v. *Mimms*, 434 U. S. 106 (1977), nor *Adams* v. *Williams*, 407 U. S. 143 (1972), provides any support for the Court's conclusion in this case. The *Terry* searches in *Mimms* and *Adams* were both limited and involved only searches of the person. See 434 U. S., at 111–112; 407 U. S., at 146, 148.

The Court's reliance on *Chimel* v. *California*, 395 U. S. 752 (1969), and *New York* v. *Belton*, 453 U. S. 454 (1981), as support for its new "area search" rule within the context of a *Terry* stop is misplaced. In *Chimel*, the Court addressed the scope of a search incident to a lawful arrest, 395 U. S., at 753, and held invalid the search at issue there because it "went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him." *Id.*, at 768. *Chimel* stressed the need to limit the scope of searches incident to arrest and overruled two prior decisions of this Court validating overly broad searches. *Ibid.*

In *Belton*, the Court considered the scope of a search incident to the lawful custodial arrest of an occupant of an automobile. 453 U. S., at 455. In this "particular and problematic context," *id.*, at 460, n. 3, the Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.*, at 460 (footnote omitted).[3]

The critical distinction between this case and *Terry* on the one hand, and *Chimel* and *Belton* on the other, is that the latter two cases arose within the context of lawful custodial arrests supported by probable cause.[4] The Court in *Terry* expressly recognized the difference between a search incident to arrest and the "limited search for weapons," 392 U. S., at 25, involved in that case. The Court stated:

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[3] The Court went on to state that "the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach." 453 U. S. 460 (footnote omitted).

[4] There was no arrest before the search in this case, see *ante*, at 1035, n. 1, and the Court does not address whether the police may conduct a search as broad as those authorized by *Belton* and *United States* v. *Ross*, 456 U. S. 798 (1982), if they have probable cause to arrest, but do not actually effect the arrest. See *ante*, at 1035, n. 1.

> "[A search incident to arrest], although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon, . . . is also justified on other grounds, . . . and can therefore involve a relatively extensive exploration of the person. A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. . . . Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a 'full' search, even though it remains a serious intrusion.
>
> ". . . An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows. The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person." *Id.*, at 25–26 (footnote omitted).

In *United States* v. *Robinson*, 414 U. S. 218 (1973), the Court relied on the differences between searches incident to lawful custodial arrests and *Terry* "stop-and-frisk" searches to reject an argument that the limitations established in *Terry* should be applied to a search incident to arrest. 414 U. S., at 228. The Court noted that "*Terry* clearly recognized the distinction between the two types of searches, and that a different rule governed one than governed the other," *id.*, at 233, and described *Terry* as involving "stricter . . . standards," 414 U. S., at 234, than those governing searches incident to arrest. The Court went on to state:

> "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Id.*, at 235.

See also *id.*, at 237–238 (POWELL, J., concurring) ("The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest" (footnote omitted)); *Gustafson* v. *Florida*, 414 U. S. 260, 264 (1973).

As these cases recognize, there is a vital difference between searches incident to lawful custodial arrests and *Terry* protective searches. The Court deliberately ignores that difference in relying on principles developed within the context of intrusions supported by probable cause to arrest to construct an "area search" rule within the context of a *Terry* stop.

The Court denies that an "area search" is fundamentally inconsistent with *Terry*, see *ante*, at 1052, n. 16, stating:

> "We have recognized that *Terry* searches are limited insofar as they may not be conducted in the absence of an articulable suspicion that the intrusion is justified, see *e. g.*, *Sibron* v. *New York*, 392 U. S. 40, 65 (1968), and that they are protective in nature and limited to weapons, see *Ybarra* v. *Illinois*, 444 U. S. 85, 93–94 (1979). However, neither of these concerns is violated by our decision. To engage in an area search, which is limited to seeking weapons, the officer must have an articulable suspicion that the suspect is potentially dangerous." *Ibid.*

This patently is no answer: respondent's argument relates to the *scope* of the search, not to the standard that justifies it. The Court flouts *Terry*'s holding that *Terry* searches must be carefully limited in scope. See *supra*, at 1056. Indeed, the page in *Sibron* v. *New York*, 392 U. S. 40 (1968), cited by the Court states:

> "Even assuming *arguendo* that there were adequate grounds to search Sibron for weapons, the nature *and scope* of the search conducted by Patrolman Martin were so clearly unrelated to that justification as to render the heroin inadmissible. The search for weapons approved in *Terry* consisted *solely of a limited patting of the outer clothing of the suspect* for concealed objects which might be used as instruments of assault. Only when he discovered such objects did the officer in *Terry* place his hands in the pockets of the men he searched. In this case, with no attempt at an initial limited exploration for arms, Patrolman Martin thrust his hand into Sibron's pocket and took from him envelopes of heroin. His testimony shows that he was looking for narcotics, and he found them. The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man." *Id.*, at 65 (emphasis supplied).[5]

As this passage makes clear, the scope of a search is determined not only by reference to its purpose, but also by reference to its intrusiveness. Yet the Court today holds that a search of a car (and the containers within it) that is not even occupied by the suspect is only as intrusive as, or perhaps less intrusive than, thrusting a hand into a pocket after an initial patdown has suggested the presence of concealed objects that might be used as weapons.

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[5] See also *Ybarra* v. *Illinois*, 444 U. S. 85, 93 (1979) ("Under *[Terry]* a law enforcement officer, for his own protection and safety, may conduct a *patdown* to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted" (emphasis supplied)).

The Court suggests no limit on the "area search" it now authorizes. The Court states that a "search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." *Ante*, at 1049 (footnote omitted). Presumably a weapon "may be placed or hidden" anywhere in a car. A weapon also might be hidden in a container in the car. In this case, the Court upholds the officer's search of a leather pouch because it "could have contained a weapon." *Ante*, at 1050–1051 (footnote omitted). In addition, the Court's requirement that an officer have a reasonable suspicion that a suspect is armed and dangerous does little to check the initiation of an area search. In this case, the officers saw a hunting knife in the car, see *ante*, at 1036, 1050, but the Court does not base its holding that the subsequent search was permissible on the ground that possession of the knife may have been illegal under state law. See *ante*, at 1052–1053, n. 16. An individual can lawfully possess many things that can be used as weapons. A hammer, or a baseball bat, can be used as a very effective weapon. Finally, the Court relies on the following facts to conclude that the officers had a reasonable suspicion that respondent was presently dangerous: the hour was late; the area was rural; respondent had been driving at an excessive speed; he had been involved in an accident; he was not immediately responsive to the officers' questions; and he appeared to be under the influence of some intoxicant. *Ante*, at 1050. Based on these facts, one might reasonably conclude that respondent was drunk. A drunken driver is indeed dangerous while driving, but not while stopped on the roadside by the police. Even when an intoxicated person lawfully has in his car an object that could be used as a weapon, it requires imagination to conclude that he is presently dangerous. Even assuming that the facts in this case justified the officers' initial "frisk" of respondent, see *ante*, at 1035–1036, 1050–1051, and n. 15, they hardly provide adequate justification for a search of a suspect's car and the containers within it. This represents an intrusion not just different in degree, but in kind, from the intrusion sanctioned by *Terry*. In short, the implications of the Court's decision are frightening.

The Court also rejects the Michigan Supreme Court's view that it "was not reasonable for the officers to fear that [respondent] could injure them, because he was effectively under their control during the investigative stop and could not get access to any weapons that might have been located in the automobile." *Ante*, at 1051. In this regard, the Court states:

> "[W]e stress that a *Terry* investigation, such as the one that occurred here, involves a police investigation 'at close range,' . . . when the officer remains particularly vulnerable in part *because* a full custodial arrest has not been effected, and the officer must make a 'quick decision as to how to protect himself and others from possible danger.' . . . In such circumstances, we have not required that officers adopt alternative means to ensure their safety in order to avoid the intrusion involved in a *Terry* encounter." *Ante*, at 1052 (footnote omitted; emphasis in original).

Putting aside the fact that the search at issue here involved a far more serious intrusion than that "involved in a *Terry* encounter," see *ibid.*, and as such might suggest the need for resort to "alternative means," the Court's reasoning is perverse. The Court's argument in essence is that the *absence* of probable cause to arrest compels the conclusion that a broad search, traditionally associated in scope with a search incident to arrest, must be permitted based on reasonable suspicion. But *United States* v. *Robinson*, stated: "It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop." 414 U. S., at 234–235. In light of *Robinson*'s observation, today's holding leaves in grave doubt the question of whether the Court's assessment of the relative dangers posed by given confrontations is based on any principled standard.

Moreover, the Court's reliance on a "balancing" of the relevant interests to justify its decision, see *ante*, at 1051, is certainly inappropriate. In *Dunaway* v. *New York*, 442 U. S. 200 (1979), the Court stated that "[t]he narrow intrusions involved in [*Terry* and its progeny] were judged by a balancing test rather than by the general principle that Fourth Amendment seizures must be supported by the 'long-prevailing standards' of probable cause, . . . only because these intrusions fell far short of the kind of intrusion associated with an arrest." *Id.*, at 212. The intrusion involved in this case is precisely "the kind of intrusion associated with an arrest." There is no justification, therefore, for "balancing" the relevant interests.

In sum, today's decision reflects once again the threat to Fourth Amendment values posed by "balancing." See *United States* v. *Place*, 462 U. S., at 717–719 (BRENNAN, J., concurring in result). As Justice Frankfurter stated in *United States* v. *Rabinowitz*, 339 U. S. 56 (1950):

> "To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that an 'unreasonable search' is forbidden—that the search must be reasonable. What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history and the experience which it embodies and the safeguards afforded by it against the evils to which it was a response." *Id.*, at 83 (dissenting opinion).

Hornbook law has been that "the police may not conduct a search unless they first convince a neutral magistrate that there is probable cause to do so." *New York* v. *Belton*, 453 U. S., at 457. While under some circumstances the police may search a car without a warrant, see, *e. g.*, *Carroll* v. *United States*, 267 U. S. 132 (1925), "the exception to the warrant requirement established in *Carroll* . . . applies only to searches of vehicles that are supported by probable cause." *United States* v. *Ross*, 456 U. S. 798, 809 (1982) (footnote omitted). "[T]he Court in *Carroll* emphasized the importance of the requirement that officers have probable cause to believe that the vehicle contains contraband." *Id.*, at 807–808. See also *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 269 (1973) ("Automobile or no automobile, there must be probable cause for the search" (footnote omitted)). Today the Court discards these basic principles and employs the very narrow exception established by *Terry* "to swallow the general rule that Fourth Amendment [searches of cars] are 'reasonable' only if based on probable cause."[6] *Dunaway* v. *New York*, *supra*, at 213. See also *United States* v. *Place*, *supra*, at 718–719 (BRENNAN, J., concurring in result).

Today's decision disregards the Court's warning in *Almeida-Sanchez:* "The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." 413 U. S., at 273. Of course, police should not be exposed to unnecessary danger in the performance of their duties. But a search of a car and the containers within it based on nothing more than reasonable suspicion, even under the circumstances present here, cannot be sustained without doing violence to the requirements of the Fourth Amendment. There is no reason in this case why the officers could not have pursued less intrusive, but equally effective, means of insuring their safety.[7] Cf. *United States* v. *Place*, *supra*, at 715–716; *Florida* v. *Royer*, 460 U. S., at 511, n. (BRENNAN, J., concurring in result). The Court takes a long step today toward "balancing" into oblivion the protections the Fourth Amendment affords. I dissent, for as Justice Jackson said in *Brinegar* v. *United States*, 338 U. S. 160 (1949):

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[6] Of course, the Court's decision also swallows the general rule that searches of containers must be based on probable cause. Without probable cause to search the car, *United States* v. *Ross* does not apply. See 456 U. S., at 825. Moreover, in the absence of a lawful custodial arrest, see n. 4, *supra*, *New York* v. *Belton* does not apply. See 453 U. S., at 460; *supra*, at 1057–1058.

> "[Fourth Amendment rights] are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Id.*, at 180 (dissenting opinion).

JUSTICE STEVENS, dissenting.

The jurisprudential questions presented in this case are far more important than the question whether the Michigan police officer's search of respondent's car violated the Fourth Amendment. The case raises profoundly significant questions concerning the relationship between two sovereigns—the State of Michigan and the United States of America.

The Supreme Court of the State of Michigan expressly held "that the deputies' search of the vehicle was proscribed by the Fourth Amendment to the United States Constitution and *art 1, § 11 of the Michigan Constitution*." 413 Mich. 461, 472–473, 320 N. W. 2d 866, 870 (1982) (emphasis added).

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[7] The police, for example, could have continued to detain respondent outside the car and asked him to tell them where his registration was. The police then could have retrieved the registration themselves. This would have resulted in an intrusion substantially less severe than the one at issue here.

The state law ground is clearly adequate to support the judgment, but the question whether it is independent of the Michigan Supreme Court's understanding of federal law is more difficult. Four possible ways of resolving that question present themselves: (1) asking the Michigan Supreme Court directly, (2) attempting to infer from all possible sources of state law what the Michigan Supreme Court meant, (3) presuming that adequate state grounds are independent unless it clearly appears otherwise, or (4) presuming that adequate state grounds are *not* independent unless it clearly appears otherwise. This Court has, on different occasions, employed each of the first three approaches; never until today has it even hinted at the fourth. In order to "achieve the consistency that is necessary," the Court today undertakes a reexamination of all the possibilities. *Ante*, at 1039. It rejects the first approach as inefficient and unduly burdensome for state courts, and rejects the second approach as an inappropriate expenditure of our resources. *Ante*, at 1039–1040. Although I find both of those decisions defensible in themselves, I cannot accept the Court's decision to choose the fourth approach over the third—to presume that adequate state grounds are intended to be dependent on federal law unless the record plainly shows otherwise. I must therefore dissent.

If we reject the intermediate approaches, we are left with a choice between two presumptions: one in favor of our taking jurisdiction, and one against it. Historically, the latter presumption has always prevailed. See, *e. g.*, *Durley* v. *Mayo*, 351 U. S. 277, 285 (1956); *Stembridge* v. *Georgia*, 343 U. S. 541, 547 (1952); *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52 (1934). The rule, as succinctly stated in *Lynch*, was as follows:

> "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this

> Court will not take jurisdiction. *Allen* v. *Arguimbau*, 198 U. S. 149, 154, 155; *Johnson* v. *Risk*, [137 U. S. 300, 306, 307]; *Wood Mowing & Reaping Machine Co.* v. *Skinner*, [139 U. S. 293, 295, 297]; *Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry. Co.*, 228 U. S. 596, 599; *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300, 302, 304." *Id.*, at 54–55.

The Court today points out that in several cases we have weakened the traditional presumption by using the other two intermediate approaches identified above. Since those two approaches are now to be rejected, however, I would think that *stare decisis* would call for a return to historical principle. Instead, the Court seems to conclude that because some precedents are to be rejected, we must overrule them all.[1]

Even if I agreed with the Court that we are free to consider as a fresh proposition whether we may take presumptive jurisdiction over the decisions of sovereign States, I could not agree that an expansive attitude makes good sense. It appears to be common ground that any rule we adopt should show "respect for state courts, and [a] desire to avoid advisory opinions." *Ante*, at 1040. And I am confident that all Members of this Court agree that there is a vital interest in the sound management of scarce federal judicial resources. All of those policies counsel against the exercise of federal jurisdiction. They are fortified by my belief that a policy of judicial restraint—one that allows other decisional bodies to have the last word in legal interpretation until it is truly necessary for this Court to intervene—enables this Court to make its most effective contribution to our federal system of government.

The nature of the case before us hardly compels a departure from tradition. These are not cases in which an American citizen has been deprived of a right secured by the United

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[1] A sampling of the cases may be found in the footnotes to my dissenting opinion in *South Dakota* v. *Neville*, 459 U. S. 553, 566 (1983). See also n. 4, *infra*.

States Constitution or a federal statute. Rather, they are cases in which a state court has upheld a citizen's assertion of a right, finding the citizen to be protected under both federal and state law. The attorney for the complaining party is an officer of the State itself, who asks us to rule that the state court interpreted federal rights too broadly and "overprotected" the citizen.

Such cases should not be of inherent concern to this Court. The reason may be illuminated by assuming that the events underlying this case had arisen in another country, perhaps the Republic of Finland. If the Finnish police had arrested a Finnish citizen for possession of marihuana, and the Finnish courts had turned him loose, no American would have standing to object. If instead they had arrested an American citizen and acquitted him, we might have been concerned about the arrest but we surely could not have complained about the acquittal, even if the Finnish court had based its decision on its understanding of the United States Constitution. That would be true even if we had a treaty with Finland requiring it to respect the rights of American citizens under the United States Constitution. We would only be motivated to intervene if an American citizen were unfairly arrested, tried, and convicted by the foreign tribunal.

In this case the State of Michigan has arrested one of its citizens and the Michigan Supreme Court has decided to turn him loose. The respondent is a United States citizen as well as a Michigan citizen, but since there is no claim that he has been mistreated by the State of Michigan, the final outcome of the state processes offended no federal interest whatever. Michigan simply provided greater protection to one of its citizens than some other State might provide or, indeed, than this Court might require throughout the country.

I believe that in reviewing the decisions of state courts, the primary role of this Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard. That belief resonates with statements in many of our prior cases.

In *Abie State Bank* v. *Bryan*, 282 U. S. 765 (1931), the Supreme Court of Nebraska had rejected a federal constitutional claim, relying in part on the state law doctrine of laches. Writing for the Court in response to the Nebraska Governor's argument that the Court should not accept jurisdiction because laches provided an independent ground for decision, Chief Justice Hughes concluded that this Court must ascertain for itself whether the asserted nonfederal ground independently and adequately supported the judgment "in order that constitutional guaranties may appropriately be enforced." *Id.*, at 773. He relied on our earlier opinion in *Union Pacific R. Co.* v. *Public Service Comm'n of Missouri*, 248 U. S. 67 (1918), in which Justice Holmes had made it clear that the Court engaged in such an inquiry so that it would not "be possible for a State to impose an unconstitutional burden" on a private party. *Id.*, at 70. And both *Abie* and *Union Pacific* rely on *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261 (1912), in which the Court explained its duty to review the findings of fact of a state court "where a Federal right has been denied."

Until recently we had virtually no interest in cases of this type. Thirty years ago, this Court reviewed only one. *Nevada* v. *Stacher*, 346 U. S. 906 (1953). Indeed, that appears to have been the only case during the entire 1953 Term in which a State even sought review of a decision by its own judiciary. Fifteen years ago, we did not review any such cases, although the total number of requests had mounted to three.[2] Some time during the past decade, perhaps about the time of the 5-to-4 decision in *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562 (1977), our priorities shifted. The result is a docket swollen with requests by States to reverse judgments that their courts have rendered in favor of their citizens.[3] I am confident that a future Court will recognize the error of this allocation of resources. When that day comes, I think it likely that the Court will also reconsider the propriety of today's expansion of our jurisdiction.

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[2] In *Commonwealth* v. *Dell Publications, Inc.*, 427 Pa. 189, 233 A. 2d 840 (1967), the Supreme Court of Pennsylvania held that the First and Fourteenth Amendments protected the defendant's right to publish and distribute the book "Candy." The Commonwealth petitioned to this Court, and we denied certiorari. 390 U. S. 948 (1968). In *People* v. *Noroff*, 67 Cal. 2d 791, 433 P. 2d 479 (1967), the Supreme Court of California held that the First and Fourteenth Amendments protected the defendant's right to distribute a magazine called "International Nudist Sun." The

The Court offers only one reason for asserting authority over cases such as the one presented today: "an important need for uniformity in federal law [that] goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds and where the independence of an alleged state ground is not apparent from the four corners of the opinion." *Ante*, at 1040 (emphasis omitted). Of course, the supposed need to "review an opinion" clashes directly with our oft-repeated reminder that "our power is to correct wrong judgments, not to revise opinions." *Herb* v. *Pitcairn*, 324 U. S. 117, 126 (1945). The clash is not merely one of form: the "need for uniformity in federal law" is truly an ungovernable engine. That same need is no less present when

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State petitioned to this Court, and we denied certiorari. 390 U. S. 1012 (1968). In *State* v. *Franc*, 165 Colo. 69, 437 P. 2d 48 (1968), the Supreme Court of Colorado held that under Colorado law title in a certain piece of property should be quieted in a citizen. The State petitioned to this Court, and we denied certiorari. 392 U. S. 928 (1968).

[3] This Term, we devoted argument time to *Florida* v. *Royer*, 460 U. S. 491 (1983); *Illinois* v. *Gates*, 462 U. S. 213 (1983) (argued twice); *Connecticut* v. *Johnson*, 460 U. S. 73 (1983); *Missouri* v. *Hunter*, 459 U. S. 359 (1983); *South Dakota* v. *Neville*, 459 U. S. 553 (1983); *Texas* v. *Brown*, 460 U. S. 730 (1983); *California* v. *Ramos*, *ante*, p. 992; *Florida* v. *Casal*, 462 U. S. 637 (1983); *City of Revere* v. *Massachusetts General Hospital*, *ante*, p. 239; *Oregon* v. *Bradshaw*, 462 U. S. 1039 (1983); *Illinois* v. *Andreas*, *ante*, p. 765; *Illinois* v. *Lafayette*, 462 U. S. 640 (1983), as well as this case. And a cursory survey of the United States Law Week index reveals that so far this Term at least 80 petitions for certiorari to state courts were filed by the States themselves.

it is perfectly clear that a state ground is both independent and adequate. In fact, it is equally present if a state prosecutor announces that he believes a certain policy of nonenforcement is commanded by federal law. Yet we have never claimed jurisdiction to correct such errors, no matter how egregious they may be, and no matter how much they may thwart the desires of the state electorate. We do not sit to expound our understanding of the Constitution to interested listeners in the legal community; we sit to resolve disputes. If it is not apparent that our views would affect the outcome of a particular case, we cannot presume to interfere.[4]

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[4] In this regard, one of the cases overruled today deserves comment. In *Minnesota* v. *National Tea Co.*, 309 U. S. 551 (1940), the Court considered a case much like this one—the Minnesota Supreme Court had concluded that both the Fourteenth Amendment to the United States Constitution and Art. 9, § 1, of the Minnesota Constitution prohibited a graduated income tax on chainstore income. The state court stated that "th[e] provisions of the Federal and State Constitutions impose identical restrictions upon the legislative power of the state in respect to classification for purposes of taxation," and "then adverted briefly to three of its former decisions which had interpreted" the state provision. 309 U. S., at 552–553. It then proceeded to conduct a careful analysis of the Federal Constitution. It could justly be said that the decision rested primarily on federal law. Cf. *ante*, at 1042. The majority of the Court reasoned as follows:

> "Enough has been said to demonstrate that there is considerable uncertainty as to the precise grounds for the decision. That is sufficient reason for us to decline at this time to review the federal question asserted to be present, *Honeyman* v. *Hanan*, 300 U. S. 14, consistently with the policy of not passing upon questions of a constitutional nature which are not clearly necessary to a decision of the case." 309 U. S., at 555.

The Court therefore remanded to the state court for clarification.

Today's Court rejects that approach as intruding unduly on the state judicial process. One might therefore expect it to turn to Chief Justice Hughes' dissenting opinion in *National Tea*. In a careful statement of the applicable principles, he made an observation that I find unanswerable:

> "The fact that provisions of the state and federal constitutions may be similar or even identical does not justify us in disturbing a judgment of a state court which adequately rests upon its application of the provisions of

Finally, I am thoroughly baffled by the Court's suggestion that it must stretch its jurisdiction and reverse the judgment of the Michigan Supreme Court in order to show "[r]espect for the independence of state courts." *Ante*, at 1040. Would we show respect for the Republic of Finland by convening a special sitting for the sole purpose of declaring that its decision to release an American citizen was based upon a misunderstanding of American law?

I respectfully dissent.

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its own constitution. That the state court may be influenced by the reasoning of our opinions makes no difference. The state court may be persuaded by majority opinions in this Court or it may prefer the reasoning of dissenting judges, but the judgment of the state court upon the application of its own constitution remains a judgment which we are without jurisdiction to review. Whether in this case we thought that the state tax was repugnant to the federal constitution or consistent with it, the judgment of the state court that the tax violated the state constitution would still stand. It cannot be supposed that the Supreme Court of Minnesota is not fully conscious of its independent authority to construe the constitution of the State, whatever reasons it may adduce in so doing." *Id.*, at 558–559.

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS ET AL. v. NORRIS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-52. Argued March 28, 1983—Decided July 6, 1983

Respondent, a female employee of an Arizona state agency, instituted a class action in Federal District Court, alleging that the State's deferred compensation plan for its employees discriminated on the basis of sex in violation of Title VII of the Civil Rights Act of 1964. Under the plan, employees have the option of receiving retirement benefits from one of several companies selected by the State, all of which pay lower monthly retirement benefits to a woman than to a man who has made the same contributions. The District Court granted summary judgment for the plaintiff class and ordered that retired female employees be paid benefits equal to those paid to similarly situated men. The Court of Appeals affirmed.

Held: The State's retirement plan discriminates on the basis of sex in violation of Title VII, and all retirement benefits derived from contributions made after this decision must be calculated without regard to the beneficiary's sex. But benefits derived from contributions made prior to this decision may be calculated as provided by the existing terms of the Arizona plan.

671 F. 2d 330, affirmed in part, reversed in part, and remanded.

John L. Endicott, Special Assistant Attorney General of Arizona, argued the cause for petitioners. With him on the briefs were *Robert K. Corbin*, Attorney General, and *John L. Jones*, Assistant Attorney General.

Amy Jo Gittler argued the cause for respondent. With her on the brief was *Neal J. Beets*.*

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*Briefs of *amici curiae* urging reversal were filed by *Jim Smith*, Attorney General, and *Mitchell D. Franks*, Assistant Attorney General, for the State of Florida; by *Harry L. Dubrin, Jr.*, for the New York State Teachers' Retirement System; by *Erwin N. Griswold*, *Jack H. Blaine*, and *Edward J. Zimmerman* for the American Council of Life Insurance; by *Robert E. Williams*, *Douglas S. McDowell*, and *Monte B. Lake* for the

PER CURIAM.

Petitioners in this case administer a deferred compensation plan for employees of the State of Arizona. The respondent class consists of all female employees who are enrolled in the plan or will enroll in the plan in the future. Certiorari was granted to decide whether Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. V), prohibits an employer from offering its employees the option of receiving retirement benefits from one of several companies selected by the employer, all of which pay lower monthly retirement benefits to a woman than to a man who has made the same contributions; and whether, if so, the relief awarded by the District Court was proper. 459 U. S. 904 (1982). The Court holds that this practice does constitute discrimination on the basis of sex in violation of Title VII, and that all retirement benefits derived from contributions made after the decision today must be cal-

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Equal Employment Advisory Council; by *William R. Glendon*, *James B. Weidner*, and *James W. Paul* for the Teachers Insurance and Annuity Association et al.; and by *Spencer L. Kimball* for the National Association of Insurance Commissioners.

Briefs of *amici curiae* urging affirmance were filed by *Lawrence White*, *Woodley B. Osborne*, *Joy L. Koletsky*, *Ralph S. Spritzer*, and *John L. Pottenger, Jr.*, for the American Association of University Professors et al.; by *Mary L. Heen*, *Burt Neuborne*, *Isabelle Katz Pinzler*, *Joan E. Bertin*, and *Charles S. Sims* for the American Civil Liberties Union et al.; by *J. Albert Woll*, *Marsha Berzon*, *Laurence Gold*, and *Winn Newman* for the American Federation of Labor and Congress of Industrial Organizations et al.; by *Jonathan R. Harkavy*, *Edward W. Kriss*, and *Nahomi Harkavy* for the American Nurses' Association; by *Richard C. Dinkelspiel*, *Norman Redlich*, *William L. Robinson*, *Norman J. Chachkin*, *Beatrice Rosenberg*, *Richard T. Seymour*, *Jack Greenberg*, *James M. Nabrit III*, and *Barry L. Goldstein* for the Lawyers' Committee for Civil Rights Under Law et al.; and by *Robert A. Jablon* and *Ron M. Landsman* for the National Insurance Consumer Organization.

Briefs of *amici curiae* were filed by *Lawrence J. Latto*, *Stephen J. Hadley*, and *William D. Hager* for the American Academy of Actuaries; and by *Terry Rose Saunders* for Eight Individual Actuaries.

culated without regard to the sex of the beneficiary. This position is expressed in Parts I, II, and III of the opinion of JUSTICE MARSHALL, *post*, at this page and 1076–1091, which are joined by JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE STEVENS, and JUSTICE O'CONNOR. The Court further holds that benefits derived from contributions made prior to this decision may be calculated as provided by the existing terms of the Arizona plan. This position is expressed in Part III of the opinion of JUSTICE POWELL, *post*, at 1105, which is joined by THE CHIEF JUSTICE, JUSTICE BLACKMUN, JUSTICE REHNQUIST, and JUSTICE O'CONNOR. Accordingly, the judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion. The Clerk is directed to issue the judgment August 1, 1983.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE STEVENS join, and with whom JUSTICE O'CONNOR joins as to Parts I, II, and III, concurring in the judgment in part.

In *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702 (1978), this Court held that Title VII of the Civil Rights Act of 1964 prohibits an employer from requiring women to make larger contributions in order to obtain the same monthly pension benefits as men. The question presented by this case is whether Title VII also prohibits an employer from offering its employees the option of receiving retirement benefits from one of several companies selected by the employer, all of which pay a woman lower monthly benefits than a man who has made the same contributions.

I

A

Since 1974 the State of Arizona has offered its employees the opportunity to enroll in a deferred compensation plan administered by the Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans (Governing Committee). Ariz. Rev. Stat. Ann. § 38–871 *et seq.* (1974 and Supp. 1982–1983); Ariz. Regs. 2–9-01 *et seq.* (1975). Employees who participate in the plan may thereby postpone the receipt of a portion of their wages until retirement. By doing so, they postpone paying federal income tax on the amounts deferred until after retirement, when they receive those amounts and any earnings thereon.[1]

After inviting private companies to submit bids outlining the investment opportunities that they were willing to offer state employees, the State selected several companies to participate in its deferred compensation plan. Many of the companies selected offer three basic retirement options: (1) a single lump-sum payment upon retirement, (2) periodic payments of a fixed sum for a fixed period of time, and (3) monthly annuity payments for the remainder of the employee's life. When an employee decides to take part in the deferred compensation plan, he must designate the company in which he wishes to invest his deferred wages. Employees must choose one of the companies selected by the State to participate in the plan; they are not free to invest their deferred compensation in any other way. At the time an employee enrolls in the plan, he may also select one of the pay-out options offered by the company that he has chosen, but when he reaches retirement age he is free to switch to one of the company's other options. If at retirement the employee decides to receive a lump-sum payment, he may also purchase any of the options then being offered by the other companies participating in the plan. Many employees find an annuity contract to be the most attractive option, since receipt of a lump sum upon retirement requires payment of taxes on the entire sum in one year, and the choice of a fixed sum for a fixed period requires an employee to speculate as to how long he will live.

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[1] See 26 U. S. C. § 457 (1976 ed., Supp. V); Rev. Rul. 72–25, 1972–1 Cum. Bull. 127; Rev. Rul. 68–99, 1968–1 Cum. Bull 193; Rev. Rul. 60–31, 1960–1 Cum. Bull. 174. Arizona's deferred compensation program was approved by the Internal Revenue Service in 1974.

Once an employee chooses the company in which he wishes to invest and decides the amount of compensation to be deferred each month, the State is responsible for withholding the appropriate sums from the employee's wages and channelling those sums to the company designated by the employee. The State bears the cost of making the necessary payroll deductions and of giving employees time off to attend group meetings to learn about the plan, but it does not contribute any moneys to supplement the employees' deferred wages.

For an employee who elects to receive a monthly annuity following retirement, the amount of the employee's monthly benefits depends upon the amount of compensation that the employee deferred (and any earnings thereon), the employee's age at retirement, and the employee's sex. All of the companies selected by the State to participate in the plan use sex-based mortality tables to calculate monthly retirement benefits. App. 12. Under these tables a man receives larger monthly payments than a woman who deferred the same amount of compensation and retired at the same age, because the tables classify annuitants on the basis of sex and women on average live longer than men.[2] Sex is the only factor that the tables use to classify individuals of the same age; the tables do not incorporate other factors correlating with longevity such as smoking habits, alcohol consumption, weight, medical history, or family history. *Id.*, at 13.

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[2] Different insurance companies participating in the plan use different means of classifying individuals on the basis of sex. Several companies use separate tables for men and women. Another company uses a single actuarial table based on male mortality rates, but calculates the annuities to be paid to women by using a 6-year "setback," *i. e.*, by treating a woman as if she were a man six years younger and had the life expectancy of a man that age. App. 12.

As of August 18, 1978, 1,675 of the State's approximately 35,000 employees were participating in the deferred compensation plan. Of these 1,675 participating employees, 681 were women, and 572 women had elected some form of future annuity option. As of the same date, 10 women participating in the plan had retired, and 4 of those 10 had chosen a lifetime annuity. *Id.*, at 6.

B

On May 3, 1975, respondent Nathalie Norris, an employee in the Arizona Department of Economic Security, elected to participate in the plan. She requested that her deferred compensation be invested in the Lincoln National Life Insurance Co.'s fixed annuity contract. Shortly thereafter Arizona approved respondent's request and began withholding $199.50 from her salary each month.

On April 25, 1978, after exhausting administrative remedies, respondent brought suit in the United States District Court for the District of Arizona against the State, the Governing Committee, and several individual members of the Committee. Respondent alleged that the defendants were violating § 703(a) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U. S. C. § 2000e–2(a), by administering an annuity plan that discriminates on the basis of sex. Respondent requested that the District Court certify a class under Federal Rule of Civil Procedure 23(b)(2) consisting of all female employees of the State of Arizona "who are enrolled or will in the future enroll in the State Deferred Compensation Plan." Complaint ¶ V.

On March 12, 1980, the District Court certified a class action and granted summary judgment for the plaintiff class,[3] holding that the State's plan violates Title VII.[4] 486 F.

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[3] The material facts concerning the State's deferred compensation plan were set forth in a statement of facts agreed to by all parties. *Id.*, at 4–13.

[4] Although the District Court concluded that the State's plan violates Title VII, the court went on to consider and reject respondent's separate claim that the plan violates the Equal Protection Clause of the Fourteenth

Supp. 645. The court directed petitioners to cease using sex-based actuarial tables and to pay retired female employees benefits equal to those paid to similarly situated men.[5] The United States Court of Appeals for the Ninth Circuit affirmed, with one judge dissenting. 671 F. 2d 330 (1982). We granted certiorari to decide whether the Arizona plan violates Title VII and whether, if so, the relief ordered by the District Court was proper. 459 U. S. 904 (1982).

II

We consider first whether petitioners would have violated Title VII if they had run the entire deferred compensation plan themselves, without the participation of any insurance companies. Title VII makes it an unlawful employment practice "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U. S. C. § 2000e–2(a)(1). There is no question that the opportunity to participate in a deferred compensation plan constitutes a "conditio[n] or privileg[e] of employment,"[6] and that retirement benefits constitute a form of "compensation."[7] The issue we must decide is whether it is discrimination "because of . . . sex" to pay a retired woman lower monthly benefits than a man who deferred the same amount of compensation.

Amendment. 486 F. Supp. 645, 651 (1980). Because respondent did not cross-appeal from this ruling, it was not passed on by the Court of Appeals and is not before us.

[5] The court subsequently denied respondent's motion to amend the judgment to include an award of retroactive benefits to retired female employees as compensation for the benefits they had lost because the annuity benefits previously paid them had been calculated on the basis of sex-segregated actuarial tables. Respondent did not appeal this ruling.

[6] See *Peters* v. *Missouri-Pacific R. Co.*, 483 F. 2d 490, 492, n. 3 (CA5), cert. denied, 414 U. S. 1002 (1973).

[7] See *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702, 712, n. 23 (1978).

In *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702 (1978), we held that an employer had violated Title VII by requiring its female employees to make larger contributions to a pension fund than male employees in order to obtain the same monthly benefits upon retirement. Noting that Title VII's "focus on the individual is unambiguous," *id.*, at 708, we emphasized that the statute prohibits an employer from treating some employees less favorably than others because of their race, religion, sex, or national origin. *Id.*, at 708–709. While women as a class live longer than men, *id.*, at 704, we rejected the argument that the exaction of greater contributions from women was based on a "factor other than sex"—*i. e.*, longevity—and was therefore permissible under the Equal Pay Act:[8]

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[8] Section 703(h) of Title VII, the so-called Bennett Amendment, provides that Title VII does not prohibit an employer from "differentiat[ing] upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by [the Equal Pay Act]." 78 Stat. 257, 42 U. S. C. § 2000e–2(h).

The Equal Pay Act, 77 Stat. 56, 29 U. S. C. § 206(d), provides in pertinent part:

"(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

As in *Manhart*, *supra*, at 712, n. 23, we need not decide whether retirement benefits constitute "wages" under the Equal Pay Act, because the Bennett Amendment extends the four exceptions recognized in the Act to all forms of "compensation" covered by Title VII.

> "[A]ny individual's life expectancy is based on a number of factors, of which sex is only one. . . . [O]ne cannot 'say that an actuarial distinction based entirely on sex is "based on any other factor than sex." Sex is exactly what it is based on.'" *Id.*, at 712–713, quoting *Manhart* v. *Los Angeles Dept. of Water & Power*, 553 F. 2d 581, 588 (CA9 1976), and the Equal Pay Act.

We concluded that a plan requiring women to make greater contributions than men discriminates "because of . . . sex" for the simple reason that it treats each woman "'in a manner which but for [her] sex would [have been] different.'" 435 U. S., at 711, quoting Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1170 (1971).

We have no hesitation in holding, as have all but one of the lower courts that have considered the question,[9] that the classification of employees on the basis of sex is no more permissible at the pay-out stage of a retirement plan than at the pay-in stage.[10] We reject petitioners' contention that the

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[9] See *Spirt* v. *Teachers Ins. & Annuity Assn.*, 691 F. 2d 1054 (CA2 1982), vacated and remanded, *post*, p. 1223; *Retired Public Employees' Assn. of California* v. *California*, 677 F. 2d 733 (CA9 1982), vacated and remanded, *post*, p. 1222; *Women in City Government United* v. *City of New York*, 515 F. Supp. 295 (SDNY 1981); *Hannahs* v. *New York State Teachers' Retirement System*, 26 FEP Cases 527 (SDNY 1981); *Probe* v. *State Teachers' Retirement System*, 27 FEP Cases 1306 (CD Cal. 1981), appeal docketed, Nos. 81–5865, 81–5866 (CA9 1981); *Shaw* v. *International Assn. of Machinists & Aerospace Workers*, 24 FEP Cases 995 (CD Cal. 1980). Cf. *EEOC* v. *Colby College*, 589 F. 2d 1139 (CA1 1978). See also 29 CFR § 1604.9(f) (1982) ("It shall be an unlawful employment practice for an employer to have a pension or retirement plan . . . which differentiates in benefits on the basis of sex").

Only the Sixth Circuit has reached the opposite conclusion. *Peters* v. *Wayne State University*, 691 F. 2d 235 (1981), vacated and remanded, *post*, p. 1223.

[10] It is irrelevant that female employees in *Manhart* were required to participate in the pension plan, whereas participation in the Arizona deferred compensation plan is voluntary. Title VII forbids all discrimination concerning "compensation, terms, conditions, or privileges of employ-

Arizona plan does not discriminate on the basis of sex because a woman and a man who defer the same amount of compensation will obtain upon retirement annuity policies having approximately the same present actuarial value.[11] Arizona has simply offered its employees a choice among different levels of annuity benefits, any one of which, if offered alone, would be equivalent to the plan at issue in *Manhart*, where the employer determined both the monthly contributions employees were required to make and the level of benefits that they were paid. If a woman participating in the Arizona plan wishes to obtain monthly benefits equal to those obtained by a man, she must make greater monthly contributions than he, just as the female employees in *Manhart* had to make greater contributions to obtain equal benefits. For any particular level of benefits that a woman might wish to receive, she will have to make greater monthly contributions to obtain that level of benefits than a man would have to make. The fact that Arizona has offered a range of discriminatory benefit levels, rather than only one such level, obviously provides no basis whatsoever for distinguishing *Manhart*.

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ment," not just discrimination concerning those aspects of the employment relationship as to which the employee has no choice. It is likewise irrelevant that the Arizona plan includes two options—the lump-sum option and the fixed-sum-for-a-fixed-period option—that are provided on equal terms to men and women. An employer that offers one fringe benefit on a discriminatory basis cannot escape liability because he also offers other benefits on a nondiscriminatory basis. Cf. *Mississippi University for Women* v. *Hogan*, 458 U. S. 718, 723–724, n. 8 (1982).

[11] The present actuarial value of an annuity policy is determined by multiplying the present value (in this case, the value at the time of the employee's retirement) of each monthly payment promised by the probability, which is supplied by an actuarial table, that the annuitant will live to receive that payment. An annuity policy issued to a retired female employee under a sex-based retirement plan will have roughly the same present actuarial value as a policy issued to a similarly situated man, since the lower value of each monthly payment she is promised is offset by the likelihood that she will live longer and therefore receive more payments.

In asserting that the Arizona plan is nondiscriminatory because a man and a woman who have made equal contributions will obtain annuity policies of roughly equal present actuarial value, petitioners incorrectly assume that Title VII permits an employer to classify employees on the basis of sex in predicting their longevity. Otherwise there would be no basis for postulating that a woman's annuity policy has the same present actuarial value as the policy of a similarly situated man even though her policy provides lower monthly benefits.[12] This underlying assumption—that sex may properly be used to predict longevity—is flatly inconsistent with the basic teaching of *Manhart:* that Title VII requires employers to treat their employees as *individuals*, not "as simply components of a racial, religious, sexual, or national class." 435 U. S., at 708. *Manhart* squarely rejected the notion that, because women as a class live longer than men, an employer may adopt a retirement plan that treats every individual woman less favorably than every individual man. *Id.*, at 716–717.

As we observed in *Manhart*, "[a]ctuarial studies could unquestionably identify differences in life expectancy based on race or national origin, as well as sex." *Id.*, at 709 (footnote omitted). If petitioners' interpretation of the statute were correct, such studies could be used as a justification for paying employees of one race lower monthly benefits than employees of another race. We continue to believe that "a statute that was designed to make race irrelevant in the employment market," *ibid.*, citing *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 436 (1971), could not reasonably be construed to permit such a racial classification. And if it would be unlawful to use race-based actuarial tables, it must also be unlawful to use sex-based tables, for under Title VII a distinction based on sex stands on the same footing as a distinction based on race unless it falls within one of a few narrow exceptions that are plainly inapplicable here.[13]

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[12] See *Spirt* v. *Teachers Ins. & Annuity Assn., supra,* at 1061–1062; Brilmayer, Hekeler, Laycock, & Sullivan, Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis, 47 U. Chi. L. Rev. 505, 512–514 (1980).

What we said in *Manhart* bears repeating: "Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful." 435 U. S., at 709. The use of sex-segregated actuarial tables to calculate retirement benefits violates Title VII whether or not the tables reflect an accurate prediction of the longevity of women as a class, for under the statute "[e]ven a true generalization about [a] class" cannot justify class-based treatment.[14] *Id.*,

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[13] The exception for bona fide occupational qualifications, 42 U. S. C. § 2000e–2(e), is inapplicable since the terms of a retirement plan have nothing to do with occupational qualifications. The only possible relevant exception recognized in the Bennett Amendment, see n. 8, *supra*, is inapplicable in this case for the same reason it was inapplicable in *Manhart:* a scheme that uses sex to predict longevity is based on sex; it is not based on "any other factor other than sex." See 435 U. S., at 712 ("any individual's life expectancy is based on any number of factors, of which sex is only one").

[14] In his separate opinion in *Manhart*, JUSTICE BLACKMUN expressed doubt that that decision could be reconciled with this Court's previous decision in *General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976). In *Gilbert* a divided Court held that the exclusion of pregnancy from an employer's disability benefit plan did not constitute discrimination "because of . . . sex" within the meaning of Title VII. The majority reasoned that the special treatment of pregnancy distinguished not between men and women, but between pregnant women and nonpregnant persons of both sexes. *Id.*, at 135. The dissenters in *Gilbert* asserted that "it offends common sense to suggest that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related,'" *id.*, at 149 (BRENNAN, J., dissenting) (citation omitted), and that the special treatment of pregnancy constitutes sex discrimination because "it is the capacity to become pregnant which primarily differentiates the female from the male." *Id.*, at 162 (STEVENS, J., dissenting).

The tension in our cases that JUSTICE BLACKMUN noted in *Manhart* has since been eliminated by the enactment of the Pregnancy Discrimination Act of 1978 (PDA), Pub. L. 95–555, 92 Stat. 2076, in which Congress overruled *Gilbert* by amending Title VII to establish that "[t]he terms 'because of sex' or 'on the basis of sex' include . . . because of or on the basis of at 708. An individual woman may not be paid lower monthly benefits simply because women as a class live longer than men.[15] Cf. *Connecticut* v. *Teal*, 457 U. S. 440 (1982) (an

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pregnancy, childbirth, or related medical conditions." 42 U. S. C. § 2000e (k) (1976 ed., Supp. V). See *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669 (1983).

The enactment of the PDA buttresses our holding in *Manhart* that the greater cost of providing retirement benefits for women as a class cannot justify differential treatment based on sex. 435 U. S., at 716–717. JUSTICE REHNQUIST's opinion for the Court in *Gilbert* relied heavily on the absence of proof that the employer's disability program provided less coverage for women as a class than for men. 429 U. S., at 138–139. In enacting the PDA, Congress recognized that requiring employers to cover pregnancy on the same terms as other disabilities would add approximately $200 million to their total costs, but concluded that the PDA was necessary "to clarify [the] original intent" of Title VII. H. R. Rep. No. 95–948, pp. 4, 9 (1978). Since the purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles, see *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, *supra*, at 678–679, 680–681, Congress' decision to forbid special treatment of pregnancy despite the special costs associated therewith provides further support for our conclusion in *Manhart* that the greater costs of providing retirement benefits for female employees does not justify the use of a sex-based retirement plan. Cf. 462 U. S., at 685, n. 26. See also 29 CFR § 1604.9(e) (1982) ("It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other").

[15] As we noted in *Manhart*, "insurance is concerned with events that are individually unpredictable, but that is characteristic of many employment decisions" and has never been deemed a justification for "resort to classifications proscribed by Title VII." 435 U. S., at 710. It is true that properly designed tests can identify many job qualifications before employment, whereas it cannot be determined in advance when a particular employee will die. See *id.*, at 724 (BLACKMUN, J., concurring in part and concurring in judgment). For some jobs, however, there may be relevant skills that cannot be identified by testing. Yet Title VII clearly would not permit use of race, national origin, sex, or religion as a proxy for such an employment qualification, regardless of whether a statistical correlation could be established.

There is no support in either logic or experience for the view, referred to by JUSTICE POWELL, *post*, at 1098, that an annuity plan must classify on the basis of sex to be actuarially sound. Neither Title VII nor the Equal Pay individual may object that an employment test used in making promotion decisions has a discriminatory impact even if the class of which he is a member has not been disproportionately denied promotion).

We conclude that it is just as much discrimination "because of . . . sex" to pay a woman lower benefits when she has made the same contributions as a man as it is to make her pay larger contributions to obtain the same benefits.

III

Since petitioners plainly would have violated Title VII if they had run the entire deferred compensation plan themselves, the only remaining question as to liability is whether their conduct is beyond the reach of the statute because it is the companies chosen by petitioners to participate in the plan that calculate and pay the retirement benefits.

Title VII "primarily govern[s] relations between employees and their employer, not between employees and third parties."[16] *Manhart*, 435 U. S., at 718, n. 33. Recognizing this limitation on the reach of the statute, we noted in *Manhart* that

> "[n]othing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market." *Id.*, at 717–718 (footnote omitted).

Act "makes it unlawful to determine the funding requirements for an establishment's benefit plan by considering the [sexual] composition of the entire force," *Manhart*, 435 U. S., at 718, n. 34, and it is simply not necessary either to exact greater contributions from women than from men or to pay women lower benefits than men. For example, the Minnesota Mutual Life Insurance Co. and the Northwestern National Life Insurance Co. have offered an annuity plan that treats men and women equally. See The Chronicle of Higher Education, Vol. 25, No. 7, Oct. 13, 1982, pp. 25–26.

[16] The statute applies to employers and "any agent" of an employer. 42 U. S. C. § 2000e(b).

Relying on this caveat, petitioners contend that they have not violated Title VII because the life annuities offered by the companies participating in the Arizona plan reflect what is available in the open market. Petitioners cite a statement in the stipulation of facts entered into in the District Court that "[a]ll tables presently in use provide a larger sum to a male than to a female of equal age, account value and any guaranteed payment period." App. 10.[17]

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[17] Petitioners also emphasize that an employee participating in the Arizona plan can elect to receive a lump-sum payment upon retirement and then "purchase the largest benefit which his or her accumulated contributions could command in the open market." Brief for Petitioners 3. The fact that the lump-sum option permits this has no bearing, however, on whether petitioners have discriminated because of sex in offering an annuity option to its employees. As we have pointed out in n. 10, *supra*, it is no defense to discrimination in the provision of a fringe benefit that another fringe benefit is provided on a nondiscriminatory basis.

Although petititioners contended in the Court of Appeals that their conduct was exempted from the reach of Title VII by the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U. S. C. § 1011 *et seq.*, they have made no mention of the Act in either their petition for certiorari or their brief on the merits. "[O]nly in the most exceptional cases will we consider issues not raised in the petition," *Stone* v. *Powell*, 428 U. S. 465, 481, n. 15 (1976); see this Court's Rule 21.1(a), and but for the discussion of the question by JUSTICE POWELL we would have seen no reason to address a contention that petitioners deliberately chose to abandon after it was rejected by the Court of Appeals.

Since JUSTICE POWELL relies on the Act, however, *post*, at 1099–1102, we think it is appropriate to lay the matter to rest. The McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance." 15 U. S. C. § 1012(b). Although there are no reported Arizona cases indicating the effect of the Arizona statute cited by JUSTICE POWELL on classifications based on sex in annuity policies, we may assume that the statute would permit such classifications, for that assumption does not affect our conclusion that the application of Title VII in this case does not supersede the application of any state law regulating "the business of insurance." As the Court of Appeals explained, 671 F. 2d 330, 333 (1982), the plaintiff class in this case has not challenged the conduct of the business of insurance. No insurance company has been joined

It is no defense that all annuities immediately available in the open market may have been based on sex-segregated actuarial tables. In context it is reasonably clear that the stipulation on which petitioners rely means only that all the tables used by the companies taking part in the Arizona plan are based on sex,[18] but our conclusion does not depend upon whether petitioners' construction of the stipulation is accepted or rejected. It is irrelevant whether any other insurers offered annuities on a sex-neutral basis, since the State did not simply set aside retirement contributions and let employees purchase annuities on the open market. On the contrary, the State provided the opportunity to obtain an annu-

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as a defendant, and our judgment will in no way preclude any insurance company from offering annuity benefits that are calculated on the basis of sex-segregated actuarial tables. All that is at issue in this case is *an employment practice:* the practice of offering a male employee the opportunity to obtain greater monthly annuity benefits than could be obtained by a similarly situated female employee. It is this conduct of the employer that is prohibited by Title VII. By its own terms, the McCarran-Ferguson Act applies only to the business of insurance and has no application to employment practices. Arizona plainly is not itself involved in the business of insurance, since it has not underwritten any risks. See *Union Labor Life Ins. Co.* v. *Pireno*, 458 U. S. 119, 133 (1982) (McCarran-Ferguson Act was "intended primarily to protect '*intra*-industry cooperation' in the underwriting of risks") (emphasis in original), quoting *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, 221 (1979); *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U. S. 65, 71 (1959) ("the concept of 'insurance' [for purposes of the McCarran-Ferguson Act] involves some investment risk-taking on the part of the company"). Because the application of Title VII in this case does not supersede any state law governing the business of insurance, see *Spirt* v. *Teachers Ins. & Annuity Assn.*, 691 F. 2d, at 1064; *EEOC* v. *Wooster Brush Co.*, 523 F. Supp. 1256, 1266 (ND Ohio 1981), we need not decide whether Title VII "specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act. Cf. *Women in City Government United* v. *City of New York*, 515 F. Supp., at 302–306.

[18] This is the natural reading of the statement, since it appears in the portion of the stipulation discussing the options offered by the companies participating in the State's plan.

ity as part of its own deferred compensation plan. It invited insurance companies to submit bids outlining the terms on which they would supply retirement benefits[19] and selected the companies that were permitted to participate in the plan. Once the State selected these companies, it entered into contracts with them governing the terms on which benefits were to be provided to employees. Employees enrolling in the plan could obtain retirement benefits only from one of those companies, and no employee could be contacted by a company except as permitted by the State. Ariz. Regs. 2-9-06.A, 2-9-20.A (1975).

Under these circumstances there can be no serious question that petitioners are legally responsible for the discriminatory terms on which annuities are offered by the companies chosen to participate in the plan. Having created a plan whereby employees can obtain the advantages of using deferred compensation to purchase an annuity only if they invest in one of the companies specifically selected by the State, the State cannot disclaim responsibility for the discriminatory features of the insurers' options.[20] Since employers are ultimately responsible for the "compensation, terms, conditions, [and] privileges of employment" provided to employees, an employer that adopts a fringe-benefit scheme that discriminates among its employees on the basis of race, religion, sex, or national origin violates Title VII regardless of whether third parties are also involved in the discrimination.[21] In this case the State of Arizona was itself a party to contracts concerning the annuities to be offered by the insurance companies, and it is well established that both parties to a discriminatory contract are liable for any discriminatory provisions the contract contains, regardless of which party initially suggested inclusion of the discriminatory provisions.[22] It would be inconsistent with the broad remedial purposes of Title VII[23] to hold that an employer who adopts a discrimina-

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[19] The State's contract procurement documents asked the bidders to quote annuity rates for men and women.

[20] See *Peters* v. *Wayne State University*, 691 F. 2d, at 238; *EEOC* v. *Colby College*, 589 F. 2d, at 1141; Van Alstyne, Equality for Individuals or Equality for Groups: Implications of the Supreme Court Decision in the Manhart Case, 64 AAUP Bulletin 150, 152-155 (1978).

[21] An analogy may usefully be drawn to our decision in *Ford Motor Co.* v. *NLRB*, 441 U. S. 488 (1979). The employer in that case provided in-plant food services to its employees under a contract with an independent caterer. We held that the prices charged for the food constituted "terms and conditions of employment" under the National Labor Relations Act (NLRA)

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and were therefore mandatory subjects for collective bargaining. We specifically rejected the employer's argument that, because the food was provided by a third party, the prices did not implicate "'an aspect of the relationship between the employer and employees.'" *Id.*, at 501, quoting *Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 178 (1971). We emphasized that the selection of an independent contractor to provide the food did not change the fact that "the matter of in-plant food prices and services is an aspect of the relationship between Ford and its own employees." 441 U. S., at 501.

Just as the issue in *Ford* was whether the employer had refused to bargain with respect to "terms and conditions of employment," 29 U. S. C. § 158(d), the issue here is whether petitioners have discriminated against female employees with respect to "compensation, terms, conditions, or privileges of employment." Even more so than in-plant food prices, retirement benefits are matters "of deep concern" to employees, *id.*, at 498, and plainly constitute an aspect of the employment relationship. Indeed, in *Ford* we specifically compared in-plant food services to "other kinds of benefits, such as health insurance, implicating outside suppliers." *Id.*, at 503, n. 15. We do not think it makes any more difference here than it did in *Ford* that the employer engaged third parties to provide a particular benefit rather than directly providing the benefit itself.

[22] See *Williams* v. *New Orleans Steamship Assn.*, 673 F. 2d 742, 750–751 (CA5 1982), cert. denied, 460 U. S. 1038 (1983); *Williams* v. *Owens-Illinois, Inc.*, 665 F. 2d 918, 926 (CA9), modified and rehearing denied, 28 FEP Cases 1820, cert. denied, 459 U. S. 971 (1982); *Farmer* v. *ARA Services, Inc.*, 660 F. 2d 1096, 1104 (CA6 1981); *Grant* v. *Bethlehem Steel Corp.*, 635 F. 2d 1007, 1014 (CA2 1980), cert. denied, 452 U. S. 940 (1981); *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354, 379–380 (CA8 1973); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 799 (CA4), cert. dism'd, 404 U. S. 1006 (1971).

[23] See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 417–418, 421 (1975); *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 429–430 (1971).

tory fringe-benefit plan can avoid liability on the ground that he could not find a third party willing to treat his employees on a nondiscriminatory basis.[24] An employer who confronts such a situation must either supply the fringe benefit himself, without the assistance of any third party, or not provide it at all.

IV

We turn finally to the relief awarded by the District Court. The court enjoined petitioners to assure that future annuity payments to retired female employees shall be equal to the payments received by similarly situated male employees.[25]

In *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975), we emphasized that one of the main purposes of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.*, at 418. We recognized that there is a strong presumption that "'[t]he injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.'" *Id.*, at 418–419, quoting *Wicker* v. *Hoppock*, 6 Wall. 94, 99 (1867). Once a violation of the statute has been found, retroactive relief "should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U. S., at 421 (footnote omitted). Applying this standard, we held that the mere absence of bad faith on the part of the employer is not a sufficient reason for denying such relief. *Id.*, at 422–423.

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[24] Such a result would be particularly anomalous where, as here, the employer made no effort to determine whether third parties would provide the benefit on a neutral basis. Contrast The Chronicle of Higher Education, *supra* n. 15, at 25–26 (explaining how the University of Minnesota obtained agreements from two insurance companies to use sex-neutral annuity tables to calculate annuity benefits for its employees). Far from bargaining for sex-neutral treatment of its employees, Arizona asked companies seeking to participate in its plan to list their annuity rates for men and women separately.

[25] The court did not explain its reasons for choosing this remedy. Since respondent did not appeal the District Court's refusal to award damages for benefit payments made prior to the court's decision, see n. 5, *supra*, there is no need to consider the correctness of that ruling.

Although this Court noted in *Manhart* that "[t]he *Albemarle* presumption in favor of retroactive liability can seldom be overcome," 435 U. S., at 719, the Court concluded that under the circumstances the District Court had abused its discretion in requiring the employer to refund to female employees all contributions they were required to make in excess of the contributions demanded of men. The Court explained that "conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed that a program like the Department's was entirely lawful," since "[t]he courts had been silent on the question, and the administrative agencies had conflicting views." *Id.*, at 720 (footnote omitted). The Court also noted that retroactive relief based on "[d]rastic changes in the legal rules governing pension and insurance funds" can "jeopardiz[e] the insurer's solvency and, ultimately, the insureds' benefits," *id.*, at 721, and that the burden of such relief can fall on innocent third parties. *Id.*, at 722–723.

While the relief ordered here affects only benefit payments made after the date of the District Court's judgment, it does not follow that the relief is wholly prospective in nature, as an injunction concerning future conduct ordinarily is, and should therefore be routinely awarded once liability is established. When a court directs a change in benefits based on contributions made before the court's order, the court is awarding relief that is fundamentally retroactive in nature. This is true because retirement benefits under a plan such as that at issue here represent a return on contributions which were made during the employee's working years and which were intended to fund the benefits without any additional contributions from any source after retirement.

A recognition that the relief awarded by the District Court is partly retroactive is only the beginning of the inquiry. Absent special circumstances a victim of a Title VII violation is entitled to whatever retroactive relief is necessary to undo any damage resulting from the violation. See *Albemarle Paper Co.* v. *Moody*, *supra*, at 418–419, 421. As to any disparity in benefits that is attributable to contributions made after our decision in *Manhart*, there are no special circumstances justifying the denial of retroactive relief. Our ruling today was clearly foreshadowed by *Manhart*. That decision should have put petitioners on notice that a man and a woman who make the same contributions to a retirement plan must be paid the same monthly benefits.[26] To the extent that any disparity in benefits coming due after the date of the District Court's judgment is attributable to contributions made after *Manhart*, there is therefore no unfairness in requiring petitioners to pay retired female employees whatever sum is necessary each month to bring them up to the benefit level that they would have enjoyed had their post-*Manhart* contributions been treated in the same way as those of similarly situated male employees.

To the extent, however, that the disparity in benefits that the District Court required petitioners to eliminate is attributable to contributions made before *Manhart*, the court gave insufficient attention to this Court's recognition in *Manhart* that until that decision the use of sex-based tables might reasonably have been assumed to be lawful. Insofar as this portion of the disparity is concerned, the District Court should have inquired into the circumstances in which petitioners, after *Manhart*, could have applied sex-neutral tables to the pre-*Manhart* contributions of a female employee and a similarly situated male employee without violating any contractual rights that the latter might have had on the basis of his pre-*Manhart* contributions. If, in the case of a particular female employee and a similarly situated male employee, petitioners could have applied sex-neutral tables to pre-*Manhart* contributions without violating any contractual right of the male employee, they should have done so in order to prevent further discrimination in the payment of retirement benefits in the wake of this Court's ruling in *Manhart*.[27] Since a female employee in this situation should have had sex-neutral tables applied to her pre-*Manhart* contributions, it is only fair that petitioners be required to supplement any benefits coming due after the District Court's judgment by whatever sum is necessary to compensate her for their failure to adopt sex-neutral tables.

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[26] Only one of the several lower court decisions since *Manhart* has accepted the argument that the principle established in that decision is limited to plans that require women to make greater contributions than men, see n. 9, *supra*, and no court has held that an employer can assert as a defense that the calculation and payment of retirement benefits is made by third parties selected by the employer. See also Van Alstyne, *supra* n. 20, at 152–155 (predicting that the involvement of an independent insurer would not be recognized as a defense and noting that an employer offering a sex-based retirement plan funded by such an insurer would be well advised to act expeditiously to bring himself into compliance with the law). After *Manhart* an employer could not reasonably have assumed that a sex-based plan would be lawful. As explained *supra*, at 1088–1089, Arizona did not simply set aside wages and permit employees to purchase annuities in the open market; it therefore had no basis for assuming that the open-market exception recognized in *Manhart* would apply to its plan.

If, on the other hand, sex-neutral tables could not have been applied to the pre-*Manhart* contributions of a particular female employee and any similarly situated male employee without violating the male employee's contractual rights, it would be inequitable to award such relief. To do so would be to require petitioners to compensate the female employee for a disparity attributable to pre-*Manhart* conduct even though such conduct might reasonably have been assumed to be lawful and petitioners could not have done anything after *Manhart* to eliminate that disparity short of expending state funds. With respect to any female employee determined to fall in this category, petitioners need only ensure that her monthly benefits are no lower than they would have been had her post-*Manhart* contributions been treated in the same way as those of a similarly situated male employee.

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[27] Since the actual calculation and payment of retirement benefits was in the hands of third parties under the Arizona plan, petitioners would not automatically have been able to apply sex-neutral tables to pre-*Manhart* contributions even if pre-existing contractual rights posed no obstacle. However, petitioners were in a position to exert influence on the companies participating in the plan, which depended upon the State for the business generated by the deferred compensation plan, and we see no reason why petitioners should stand in a better position because they engaged third parties to pay the benefits than they would be in had they run the entire plan themselves.

The record does not indicate whether some or all of the male participants in the plan who had not retired at the time *Manhart* was decided[28] had any contractual right to a particular level of benefits that would have been impaired by the application of sex-neutral tables to their pre-*Manhart* contributions. The District Court should address this question on remand.

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE BLACKMUN, and JUSTICE REHNQUIST join, dissenting in part and concurring in part, and with whom JUSTICE O'CONNOR joins as to Part III.

The Court today holds that an employer may not offer its employees life annuities from a private insurance company that uses actuarially sound, sex-based mortality tables. This holding will have a far-reaching effect on the operation of insurance and pension plans. Employers may be forced to discontinue offering life annuities, or potentially disruptive changes may be required in long-established methods of calculating insurance and pensions.[1] Either course will work a major change in the way the cost of insurance is determined—to the probable detriment of *all* employees. This is contrary to our explicit recognition in *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702, 717 (1978), that Title VII "was [not] intended to revolutionize the insurance and pension industries."

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[28] Since the amount of monthly annuity payments is ordinarily fixed by the time of retirement, sex-neutral tables presumably could not have been applied after *Manhart* to male employees who had retired before that decision without violating their contractual rights.

[1] The cost of continuing to provide annuities may become prohibitive. The *minimum* additional cost necessary to equalize benefits prospectively would range from $85 to $93 million each year for at least the next 15 years. U. S. Dept. of Labor, Cost Study of the Impact of an Equal Benefits Rule

I

The State of Arizona provides its employees with a voluntary pension plan that allows them to defer receipt of a portion of their compensation until retirement. If an employee chooses to participate, an amount designated by the employee is withheld from each paycheck and invested by the State on the employee's behalf. When an employee retires, he or she may receive the amount that has accrued in one of three ways. The employee may withdraw the total amount accrued, arrange for periodic payments of a fixed sum for a fixed time, or use the accrued amount to purchase a life annuity.

There is no contention that the State's plan discriminates between men and women when an employee contributes to the fund. The plan is voluntary and each employee may contribute as much as he or she chooses. Nor does anyone contend that either of the first two methods of repaying the accrued amount at retirement is discriminatory. Thus, if Arizona had adopted the same contribution plan but provided only the first two repayment options, there would be no dispute that its plan complied with Title VII of the Civil Rights

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on Pension Benefits 4 (1983) (hereinafter Department of Labor Cost Study). This minimum cost assumes that employers will be free to use the least costly method of adjusting benefits. This assumption may be unfounded. If employers are required to "top up" benefits—*i. e.*, calculate women's benefits at the rate applicable to men rather than apply a unisex rate to both men and women—the cost of providing purely prospective benefits would range from $428 to $676 million each year for at least the next 15 years. *Id.*, at 31. No one seriously suggests that these costs will not be passed on—in large part—to the annuity beneficiaries or, in the case of state and local governments, to the public.

Act of 1964, as amended, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. V). The first two options, however, have disadvantages. If an employee chooses to take a lump-sum payment, the tax liability will be substantial.[2] The second option ameliorates the tax problem by spreading the receipt of the accrued amount over a fixed period of time. This option, however, does not guard against the possibility that the finite number of payments selected by the employee will fail to provide income for the remainder of his or her life.

The third option—the purchase of a life annuity—resolves both of these problems. It reduces an employee's tax liability by spreading the payments out over time, and it guarantees that the employee will receive a stream of payments for life. State law prevents Arizona from accepting the financial uncertainty of funding life annuities. Ariz. Rev. Stat. Ann. § 38–871(C)(1) (Supp. 1982–1983). But to achieve tax benefits under federal law, the life annuity must be purchased from a company designated by the retirement plan. Rev. Rul. 72–25, 1972–1 Cum. Bull. 127; Rev. Rul. 68–99, 1968–1 Cum. Bull 193. Accordingly, Arizona contracts with private insurance companies to make life annuities available to its employees. The companies that underwrite the life annuities, as do the vast majority of private insurance companies in the United States, use sex-based mortality tables. Thus, the only effect of Arizona's third option is to allow its employees to purchase at a tax saving the same annuities they otherwise would purchase on the open market.

The Court holds that Arizona's voluntary plan violates Title VII. In the majority's view, Title VII requires an employer to follow one of three courses. An employer must provide unisex annuities itself, contract with insurance companies to provide such annuities, or provide no annuities to its employees. *Ante*, at 1091 (MARSHALL, J., concurring in judgment in part). The first option is largely illusory. Most employers do not have either the financial resources or administrative ability to underwrite annuities. Or, as in this case, state law may prevent an employer from providing annuities. If unisex annuities are available, an employer may contract with private insurance companies to provide them. It is stipulated, however, that the insurance companies with which Arizona contracts do not provide unisex annuities, nor do insurance companies generally underwrite them. The insurance industry either is prevented by state law from doing so[3] or it views unisex mortality tables as actuarially unsound. An employer, of course, may choose the third option. It simply may decline to offer its employees the right to purchase annuities at a substantial tax saving. It is difficult to see the virtue in such a compelled choice.

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[2] The employee will be required to include the entire amount received as income. See 26 U. S. C. § 457 (1976 ed., Supp. V); Rev. Rul. 68–99, 1968–1 Cum. Bull 193.

II

As indicated above, the consequences of the Court's holding are unlikely to be beneficial. If the cost to employers of offering unisex annuities is prohibitive or if insurance carriers choose not to write such annuities, employees will be denied the opportunity to purchase life annuities—concededly the most advantageous pension plan—at lower cost.[4] If, alternatively, insurance carriers and employers choose to offer these annuities, the heavy cost burden of equalizing benefits probably will be passed on to current employees. There is no evidence that Congress intended Title VII to work such a change. Nor does *Manhart* support such a sweeping reading of this statute. That case expressly recognized the limited reach of its holding—a limitation grounded in the legislative history of Title VII and the inapplicability of Title VII's policies to the insurance industry.

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[3] See Cal. Ins. Code Ann. § 790.03(f) (West Supp. 1983) (requiring differentials based on the sex of the individual insured); *Spirt* v. *Teachers Insurance & Annuity Assn.*, 691 F. 2d 1054, 1066 (CA2 1982) (noting that State of New York has disapproved certain uses of unisex rates), vacated and remanded, *post*, p. 1223.

[4] This is precisely what has happened in this case. Faced with the liability resulting from the Court of Appeals' judgment, the State of Arizona discontinued making life annuities available to its employees. Tr. of Oral Arg. 8. Any employee who now wishes to have the security provided by a life annuity must withdraw his or her accrued retirement savings from the state pension plan, pay federal income tax on the amount withdrawn, and *then use the remainder to purchase an annuity on the* open market—which most likely will be sex-based. The adverse effect of today's holding apparently will fall primarily on the State's employees.

A

We were careful in *Manhart* to make clear that the question before us was narrow. We stated: "All that is at issue today is a requirement that men and women make unequal contributions to an *employer-operated* pension fund." 435 U. S., at 717 (emphasis added). And our holding was limited expressly to the precise issue before us. We stated that "[a]lthough we conclude that the Department's practice violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industries." *Ibid.*

The Court in *Manhart* had good reason for recognizing the narrow reach of Title VII in the particular area of the insurance industry. Congress has chosen to leave the primary responsibility for regulating the insurance industry to the respective States. See McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U. S. C. § 1011 *et seq.*[5] This Act reflects the long-held view that the "continued regulation . . . by the several States of the business of insurance is in the public interest." 15 U. S. C. § 1011; see *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 458–459 (1969). Given the consistent policy of entrusting insurance regulation to the States, the majority is not justified in assuming that Congress intended in 1964 to require the industry to change longstanding actuarial methods, approved over decades by state insurance commissions.[6]

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[5] When this Court held for the first time that the Federal Government had the power to regulate the business of insurance, see *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944) (holding the antitrust laws applicable to the business of insurance), Congress responded by passing the McCarran-Ferguson Act. As initially proposed, the Act had a narrow focus. It would have provided only: "'That nothing contained in the Act of July 2, 1890, as amended, known as the Sherman Act, or the Act of October 15, 1914, as amended, known as the Clayton Act, shall be construed to apply to the business of insurance or to acts in the conduct of that business or in any wise to impair the regulation of that business by the several States.'" S. Rep. No. 1112, 78th Cong., 2d Sess., pt. 1, p. 2 (1944) (quoting proposed Act). This narrow version, however, was not accepted. Congress subsequently proposed and adopted a much broader bill. It recognized, as it previously had, the need to accommodate federal antitrust

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laws and state regulation of insurance. See H. R. Rep. No. 143, 79th Cong., 1st Sess., 3 (1945). But it also recognized that the decision in *South-Eastern Underwriters Assn.* had raised questions as to the general validity of state laws governing the business of insurance. Some insurance carriers were reluctant to comply with state regulatory authority, fearing liability for their actions. See H. R. Rep. No. 143, at 2. Congress thus enacted broad legislation "so that the several States may know that the Congress desires to protect the continued regulation . . . of the business of insurance by the several States." *Ibid.*

The McCarran-Ferguson Act, as adopted, accordingly commits the regulation of the insurance industry presumptively to the States. The introduction to the Act provides that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of [the] business [of insurance] by the several States." 15 U. S. C. § 1011. Section 2(b) of the Act further provides: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U. S. C. § 1012(b).

[6] Most state laws regulating insurance and annuities explicitly proscribe "unfair discrimination between individuals in the same class." Bailey, Hutchinson, & Narber, The Regulatory Challenge to Life Insurance Classification, 25 Drake L. Rev. 779, 783 (1976) (emphasis omitted). Arizona insurance law similarly provides that there shall be "[no] unfair discrimination between individuals of the same class." Ariz. Rev. Stat. Ann. § 20–448 (Supp. 1982–1983). Most States, including Arizona, have determined that the use of actuarially sound, sex-based mortality tables comports with this state definition of discrimination. Given the provision of the McCarran-Ferguson Act that Congress intends to supersede state insurance regulation only when it enacts laws that "specifically relat[e] to the business of insurance," see n. 5, *supra*, the majority offers no satisfactory

Nothing in the language of Title VII supports this pre-emption of state jurisdiction. Nor has the majority identified any evidence in the legislative history that Congress con-

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reason for concluding that Congress intended Title VII to pre-empt this important area of state regulation.

The majority states that the McCarran-Ferguson Act is not relevant because the petitioners did not raise the issue in their brief. See *ante*, at 1087–1088, n. 17 (MARSHALL, J., concurring in judgment in part). This misses the point. The question presented is whether Congress intended Title VII to prevent employers from offering their employees—pursuant to state law—actuarially sound, sex-based annuities. The McCarran-Ferguson Act is explicitly relevant to determining congressional intent. It provides that courts should not presume that Congress intended to supersede state regulation of insurance unless the Act in question "specifically relates to the business of insurance." See n. 5, *supra*. It therefore is necessary to consider the applicability of the McCarran-Ferguson Act in determining Congress' intent in Title VII. This presents two questions: whether the action at issue under Title VII involves the "business of insurance" and whether the application of Title VII would "invalidate, impair, or supersede" state law.

No one doubts that the determination of how risk should be spread among classes of insureds is an integral part of the "business of insurance." See *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, 213 (1979); *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U. S. 65, 73 (1959). The majority argues, nevertheless, that the McCarran-Ferguson Act is inapposite because Title VII will not supersede any state regulation. Because Title VII applies to employers rather than insurance carriers, the majority asserts that its view of Title VII will not affect the business of insurance. See *ante*, at 1087–1088, n. 17 (MARSHALL, J., concurring in judgment in part). This formalistic distinction ignores self-evident facts. State insurance laws, such as Arizona's, allow employers to purchase sex-based annuities for their employees. Title VII, as the majority interprets it, would prohibit employers from purchasing such annuities for their employees. It begs reality to say that a federal law that thus denies the right to do what state insurance law allows does not "invalidate, impair, or supersede" state law. Cf. *SEC* v. *Variable Annuity Life Ins. Co.*, *supra*, at 67. The majority's interpretation of Title VII—to the extent it banned the sale of actuarially sound, sex-based annuities—effectively would pre-empt state regulatory authority. In my view, the commands of the McCarran-Ferguson Act are directly relevant to determining Congress' intent in enacting Title VII.

sidered the widespread use of sex-based mortality tables to be discriminatory or that it intended to modify its previous grant by the McCarran-Ferguson Act of exclusive jurisdiction to the States to regulate the terms of protection offered by insurance companies. Rather, the legislative history indicates precisely the opposite.

The only reference to this issue occurs in an explanation of the Act by Senator Humphrey during the debates on the Senate floor. He stated that it was "unmistakably clear" that Title VII did not prohibit different treatment of men and women under industrial benefit plans.[7] See 110 Cong. Rec. 13663–13664 (1964). As we recognized in *Manhart*, "[alt]hough he did not address differences in employee contributions based on sex, Senator Humphrey apparently assumed that the 1964 Act would have little, if any, impact on existing pension plans." 435 U. S., at 714. This statement was not sufficient, as *Manhart* held, to preclude the application of Title VII to an *employer*-operated plan. See *ibid.* But Senator Humphrey's explanation provides strong support for *Manhart*'s recognition that Congress intended Title VII to have *only* that indirect effect on the private insurance industry.

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[7] Senator Humphrey's statement was based on the adoption of the Bennett Amendment, which incorporated the affirmative defenses of the Equal Pay Act, 77 Stat. 56, 29 U. S. C. § 206(d), into Title VII. See *County of Washington* v. *Gunther*, 452 U. S. 161, 175, n. 15 (1981). Although not free from ambiguity, the legislative history of the Equal Pay Act provides ample support for Senator Humphrey's interpretation of that Act. In explaining the Equal Pay Act's affirmative defenses, the Senate Report on that statute noted that pension costs were "higher for women than men . . . because of the longer life span of women." S. Rep. No. 176, 88th Cong., 1st Sess., 4 (1963). It then explained that the question of additional costs associated with employing women was one "that can only be answered by an ad hoc investigation." *Ibid.* Thus, it concluded that where it could be shown that there were in fact higher costs for women than men, an exception to the Equal Pay Act could be permitted "similar to those . . . for a bona fide seniority system or other exception noted above." *Ibid.*

Even if other meanings might be drawn from the Equal Pay Act's legislative history, the crucial question is how Congress viewed the Equal Pay Act in 1964 when it incorporated it into Title VII. The only relevant legislative history that exists on this point demonstrates unmistakably that Congress perceived—with good reason—that "the 1964 Act [Title VII] would have little, if any, impact on existing pension plans." *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702, 714 (1978).

B

As neither the language of the statute nor the legislative history supports its holding, the majority is compelled to rely on its perception of the policy expressed in Title VII. The policy, of course, is broadly to proscribe discrimination in employment practices. But the statute itself focuses specifically on the individual and "precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." *Id.*, at 708. This specific focus has little relevance to the business of insurance. See *id.*, at 724 (BLACKMUN, J., concurring in part and concurring in judgment). Insurance and life annuities exist because it is impossible to measure accurately how long any one individual will live. Insurance companies cannot make individual determinations of life expectancy; they must consider instead the life expectancy of identifiable groups. Given a sufficiently large group of people, an insurance company can predict with considerable reliability the rate and frequency of deaths within the group based on the past mortality experience of similar groups. Title VII's concern for the effect of employment practices on the individual thus is simply inapplicable to the actuarial predictions that must be made in writing insurance and annuities.

C

The accuracy with which an insurance company predicts the rate of mortality depends on its ability to identify groups with similar mortality rates. The writing of annuities thus requires that an insurance company group individuals according to attributes that have a significant correlation with mortality. The most accurate classification system would be to identify all attributes that have some verifiable correlation with mortality and divide people into groups accordingly, but the administrative cost of such an undertaking would be prohibitive. Instead of identifying all relevant attributes, most insurance companies classify individuals according to criteria that provide both an accurate and efficient measure of longevity, including a person's age and sex. These particular criteria are readily identifiable, stable, and easily verifiable. See Benston, The Economics of Gender Discrimination in Employee Fringe Benefits: *Manhart* Revisited, 49 U. Chi. L. Rev. 489, 499–501 (1982).

It is this practice—the use of a sex-based group classification—that the majority ultimately condemns. See *ante*, at 1083–1086 (MARSHALL, J., concurring in judgment in part). The policies underlying Title VII, rather than supporting the majority's decision, strongly suggest—at least for me—the opposite conclusion. This remedial statute was enacted to eradicate the types of discrimination in employment that then were pervasive in our society. The entire thrust of Title VII is directed against *discrimination*—disparate treatment on the basis of race or sex that intentionally or arbitrarily affects an individual. But as JUSTICE BLACKMUN has stated, life expectancy is a "nonstigmatizing factor that demonstrably differentiates females from males and that is not measurable on an individual basis. . . . [T]here is nothing arbitrary, irrational, or 'discriminatory' about recognizing the objective and accepted . . . disparity in female-male life expectancies in computing rates for retirement plans." *Manhart*, 435 U. S., at 724 (concurring in part and concurring in judgment). Explicit sexual classifications, to be sure, require close examination, but they are not automatically invalid.[8] Sex-based mortality tables reflect objective actuarial experience. Because their use does not entail discrimination in any normal understanding of that term,[9] a court should hesitate to invalidate this long-approved practice on the basis of its own policy judgment.

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[8] Title VII does not preclude the use of all sex classifications, and there is no reason for assuming that Congress intended to do so in this instance. See n. 7, *supra*.

Congress may choose to forbid the use of any sexual classifications in insurance, but nothing suggests that it intended to do so in Title VII. And certainly the policy underlying Title VII provides no warrant for extending the reach of the statute beyond Congress' intent.

III

The District Court held that Arizona's voluntary pension plan violates Title VII and ordered that future annuity payments to female retirees be made equal to payments received by similarly situated men.[10] 486 F. Supp. 645 (Ariz. 1980). The Court of Appeals for the Ninth Circuit affirmed. 671 F. 2d 330 (1982). The Court today affirms the Court of Appeals' judgment insofar as it holds that Arizona's voluntary pension plan violates Title VII. But this finding of a statutory violation provides no basis for approving the retroactive relief awarded by the District Court. To approve this award would be both unprecedented and manifestly unjust.

We recognized in *Manhart* that retroactive relief is normally appropriate in the typical Title VII case, but concluded that the District Court had abused its discretion in awarding such relief. 435 U. S., at 719. As we noted, the employer in *Manhart* may well have assumed that its pension program was lawful. *Id.*, at 720. More importantly, a retroactive remedy would have had a potentially disruptive impact on the operation of the employer's pension plan. The business of underwriting insurance and life annuities requires careful approximation of risk. *Id.*, at 721. Reserves normally are sufficient to cover only the cost of funding and administering the plan. Should an unforeseen contingency occur, such as a drastic change in the legal rules governing pension and insurance funds, both the insurer's solvency and the insured's benefits could be jeopardized. *Ibid.*

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[9] Indeed, if employers and insurance carriers offer annuities based on unisex mortality tables, men as a class will receive less aggregate benefits than similarly situated women.

[10] As JUSTICE MARSHALL notes, the relief awarded by the District Court is fundamentally retroactive in nature. See *ante*, at 1092 (concurring in judgment in part). Annuity payments are funded by the employee's past contributions and represent a return on those contributions. In order to provide women with the higher level of periodic payments ordered by the District Court, the State of Arizona would be required to fund retroactively the deficiency in past contributions made by its women retirees.

This case presents no different considerations. *Manhart* did put all employer-operated pension funds on notice that they could not "requir[e] that men and women make unequal contributions to [the] fund," *id.*, at 717, but it expressly confirmed that an employer could set aside equal contributions and let each retiree purchase whatever benefit his or her contributions could command on the "open market," *id.*, at 718. Given this explicit limitation, an employer reasonably could have assumed that it would be lawful to make available to its employees annuities offered by insurance companies on the open market.

As in *Manhart*, holding employers liable retroactively would have devastating results. The holding applies to all employer-sponsored pension plans, and the cost of complying with the District Court's award of retroactive relief would range from $817 to $1,260 million annually for the next 15 to 30 years.[11] Department of Labor Cost Study 32. In this case, the cost would fall on the State of Arizona. Presumably other state and local governments also would be affected directly by today's decision. Imposing such unanticipated financial burdens would come at a time when many States and local governments are struggling to meet substantial fiscal deficits. Income, excise, and property taxes are being increased. There is no justification for this Court, particularly in view of the question left open in *Manhart*, to impose this magnitude of burden retroactively on the public. Accordingly, liability should be prospective only.[12]

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[11] The cost to employers of equalizing benefits varies according to three factors: (i) whether the plan is a defined-contribution or a defined-benefit plan; (ii) whether benefits are to be equalized retroactively or prospectively; and (iii) whether the insurer may reallocate resources between men and women by applying unisex rates to existing reserves or must top up women's benefits. The figures in text assume, as the District Court appeared to hold, see 486 F. Supp. 645, 652 (Ariz. 1980), that employers would be required to top up women's benefits.

JUSTICE O'CONNOR, concurring.

This case requires us to determine whether Title VII prohibits an employer from offering an annuity plan in which the participating insurance company uses sex-based tables for calculating monthly benefit payments. It is important to stress that our judicial role is simply to discern the intent of the 88th Congress in enacting Title VII of the Civil Rights Act of 1964,[1] a statute covering only discrimination in employment. What we, if sitting as legislators, might consider wise legislative policy is irrelevant to our task. Nor, as JUSTICE MARSHALL notes, *ante*, at 1078–1079, n. 4, do we have before us any constitutional challenge. Finally, our decision must ignore (and our holding has no necessary effect on) the larger issue of whether considerations of sex should be barred from all insurance plans, including individual purchases of insurance, an issue that Congress is currently debating. See S. 372, 98th Cong., 1st Sess. (1983); H. R. 100, 98th Cong., 1st Sess. (1983).

Although the issue presented for our decision is a narrow one, the answer is far from self-evident. As with many other narrow issues of statutory construction, the general language chosen by Congress does not clearly resolve the precise question. Our polestar, however, must be the intent of Congress, and the guiding lights are the language, structure, and legislative history of Title VII. Our inquiry is made somewhat easier by the fact that this Court, in *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702 (1978), analyzed the intent of the 88th Congress on a related question. The Court in *Manhart* found Title VII's focus on the individual to be dispositive of the present question. Congress in enacting Title VII intended to prohibit an employer from singling out an employee by race or sex for the purpose of imposing a greater burden or denying an equal benefit because of a characteristic statistically identifiable with the group but empirically false in many individual cases. See *Manhart*, 435 U. S., at 708–710.

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[12] In this respect, I agree with JUSTICE O'CONNOR that only benefits derived from contributions collected after the effective date of the judgment need be calculated without regard to the sex of the employee. See *post*, at 1111 (O'CONNOR, J., concurring).

[1] The 92d Congress made important amendments to Title VII, including extending its coverage to state employers such as the State of Arizona. The 1972 amendments did not change the substantive requirements of Title VII, however. Thus, it is the intent of the 88th Congress that is controlling here.

Despite JUSTICE POWELL's argument, ultimately I am persuaded that the result in *Manhart* is not distinguishable from the present situation. *Manhart* did note that Title VII would allow an employer to set aside equal retirement contributions for each employee and let the retiree purchase whatever annuity his or her accumulated contributions could command on the open market. *Id.*, at 717–718. In that situation, the employer is treating each employee without regard to sex. If an independent insurance company then classifies persons on the basis of sex, the disadvantaged female worker cannot claim she was denied a privilege of employment, any more than she could complain of employment discrimination when the employer pays equal wages in a community where local merchants charge women more than men for identical items. As I stressed above, Title VII covers only discrimination in *employment*, and thus simply does not reach these other situations.

Unlike these examples, however, the employer here has done more than set aside equal lump sums for all employees. Title VII clearly does not allow an employer to offer a plan to employees under which it will collect equal contributions, hold them in a trust account, and upon retirement disburse greater monthly checks to men than women. Nor could an employer escape Title VII's mandate by using a third-party bank to hold and manage the account. In the situation at issue here, the employer has used third-party insurance companies to administer the plan, but the plan remains essentially a "privileg[e] of employment," and thus is covered by Title VII. 42 U. S. C. § 2000e–2(a)(1).[2]

For these reasons, I join Parts I, II, and III of JUSTICE MARSHALL's opinion. Unlike JUSTICE MARSHALL, however, I would not make our holding retroactive. Rather, for reasons explained below, I agree with JUSTICE POWELL that our decision should be prospective. I therefore join Part III of JUSTICE POWELL's opinion.

In *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 105–109 (1971), we set forth three criteria for determining when to apply a decision of statutory interpretation prospectively. First, the decision must establish a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed. *Id.*, at 106. Ultimately, I find this case controlled by the same principles of Title VII articulated by the Court in *Manhart*. If this first criterion were the sole consideration for prospectivity, I might find it difficult to make today's decision prospective. As reflected in JUSTICE POWELL's opinion, however, whether *Manhart* foreshadows today's decision is sufficiently debatable that the first criterion of the *Chevron* test does not compel retroactivity here. Therefore, we must examine the remaining criteria of the *Chevron* test as well.

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[2] The distinction between employment-related discrimination and discrimination not covered by Title VII is ably discussed by Van Alstyne, Equality for Individuals or Equality for Groups: Implications of the Supreme Court Decision in the Manhart Case, 64 AAUP Bulletin 150 (1978).

The second criterion is whether retroactivity will further or retard the operation of the statute. *Chevron, supra*, at 106–107. See also *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 421 (1975) (backpay should be denied only for reasons that will not frustrate the central statutory purposes). *Manhart* held that a central purpose of Title VII is to prevent employers from treating individual workers on the basis of sexual or racial group characteristics. Although retroactive application will not retard the achievement of this purpose, that goal in no way requires retroactivity. I see no reason to believe that a retroactive holding is necessary to ensure that pension plan administrators, who may have thought until our decision today that Title VII did not extend to plans involving third-party insurers, will not now quickly conform their plans to ensure that individual employees are allowed equal monthly benefits regardless of sex. See *Manhart, supra*, at 720–721.[3]

In my view, the third criterion—whether retroactive application would impose inequitable results—compels a prospective decision in these circumstances. Many working men and women have based their retirement decisions on expectations of a certain stream of income during retirement. These decisions depend on the existence of adequate reserves to fund these pensions. A retroactive holding by this Court that employers must disburse greater annuity benefits than the collected contributions can support would jeopardize the entire pension fund. If a fund cannot meet its obligations, "[t]he harm would fall in large part on innocent third parties." *Manhart, supra*, at 722–723. This real danger of bankrupting pension funds requires that our decision be made prospective. Such a prospective holding is, of course, consistent with our equitable powers under Title VII to fashion an appropriate remedy. See 42 U. S. C. § 2000e–5(g); *Manhart*, 435 U. S., at 718–719.

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[3] Another goal of Title VII is to make persons whole for injuries suffered from unlawful employment discrimination. See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 418 (1975). Although this goal would suggest that the present decision should be made retroactive, it does not necessarily control the decision on retroactivity. See *Manhart*, 435 U. S., at 719.

In my view, then, our holding should be made prospective in the following sense. I would require employers to ensure that benefits derived from contributions collected after the effective date of our judgment be calculated without regard to the sex of the employee.[4] For contributions collected before the effective date of our judgment, however, I would allow employers and participating insurers to calculate the resulting benefits as they have in the past.

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[4] In other words, I would require employers to use longevity tables that reflect the average longevity of all their workers. The Equal Pay Act proviso, 29 U. S. C. § 206(d)(1), which forbids employers to cure violations of the Act by reducing the wage rate of any employee, would not require that employers "top up" benefits by using male-longevity tables for all workers. First, although the Bennett Amendment of Title VII, 42 U. S. C. § 2000e–2(h), incorporates the Equal Pay Act defenses for disparate "compensation" as well as disparate "wages," see *Manhart, supra*, at 711–712, n. 22, the language of the Equal Pay Act proviso seems to apply only to wages. Thus, it is questionable whether the proviso would apply at all to the retirement plan at issue here. Second, even if the proviso has some relevance here, it should not be read to require a pension plan, whose entire function is actuarially to balance contributions with outgoing benefits, to calculate benefits on the basis of tables that do not reflect the composition of the work force. Cf. *Manhart, supra*, at 720, n. 36 (remedy should at least consider "ordering a refund of only the difference between contributions made by women and the contributions they would have made under an actuarially sound and nondiscriminatory plan").

ILLINOIS *v.* BATCHELDER

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

No. 82–947. Decided July 6, 1983

Under Illinois' implied-consent statute, if a driver, arrested for driving while intoxicated, refuses to take a breath-analysis test, the arresting officer must file with the clerk of the appropriate circuit court an affidavit that includes the statement that the officer had "reasonable cause to believe the person was driving the motor vehicle . . . while under the influence of intoxicating liquor." The clerk must then notify the arrestee that his license will be suspended unless he requests a hearing within a specified time. Respondent refused to take a breath-analysis test after he was arrested for driving under the influence of intoxicating liquor, and the arresting officer filed an affidavit that included the assertion that at the time of the arrest he had "reasonable grounds to believe that said person was driving a motor vehicle in this State while under the influence of intoxicating liquor." Respondent exercised his statutory right to a hearing before suspension of his license. At the hearing, the judge found that the officer's affidavit did not comply with the statute, and entered an order denying the State's request for suspension of respondent's license. The Illinois Appellate Court, although concluding that the affidavit literally complied with the statute's requirements, held that the affidavit was insufficient under the Fourth and Fourteenth Amendments, and that the statute would be constitutional only if it required an arresting officer to set out in his affidavit the underlying circumstances which provided him with a reasonable belief that the arrestee was driving under the influence of intoxicating liquor.

Held: Under the test set forth in *Mathews* v. *Eldridge*, 424 U. S. 319, 335, the Due Process Clause of the Fourteenth Amendment does not require an arresting officer, in enforcing Illinois' implied-consent statute, to recite in his affidavit the specific evidentiary matters constituting the underlying circumstances which provided him with a reasonable belief that the arrestee was driving under the influence of intoxicating liquor. The driver's right to a hearing *before* he may be deprived of his license for failing to submit to a breath-analysis test accords him all of the process that the Federal Constitution assures. Cf. *Mackey* v. *Montrym*, 443 U. S. 1.

Certiorari granted; 107 Ill. App. 3d 81, 437 N. E. 2d 364, reversed and remanded.

PER CURIAM.

An Illinois statute, Ill. Rev. Stat, ch. 95½, ¶11–501.1 (1981), provides that any person who drives an automobile in that State consents to take a breath-analysis test when requested to do so by an officer as incident to an arrest for driving while intoxicated.[1] The statute also prescribes the manner in which the test is to be administered and provides a nine-point list of matters of which the arresting officer is to inform the arrestee, including the right to refuse to submit to a breath analysis and the fact that such a refusal may be admitted in evidence against him "in any hearing concerning the suspension, revocation or denial of his license or permit." ¶11–501.1(a)(4). Finally relevant for our purposes is subsection (d) of ¶11–501.1, which provides in pertinent part:

> "The arresting officer shall file with the Clerk of the Circuit Court for the county in which the arrest was made, a sworn statement naming the person refusing to take and complete the test requested under the provisions of this Section. . . . Such sworn statement shall include a statement that the arresting officer had reasonable cause to believe the person was driving the motor vehicle within this State while under the influence of intoxicating liquor . . . .
>
> "The Clerk shall thereupon notify such person in writing that his privilege to operate a motor vehicle will be suspended unless, within 28 days from the date of mail-

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[1] Illinois Rev. Stat., ch. 95½, ¶11–501.1 (1981), provides in pertinent part:

"Suspension of license—Implied consent. (a) Any person who . . . drives a motor vehicle anywhere within this State thereby consents, under the terms of this Section, to take and complete a test or chemical analysis of his breath to determine the alcoholic content of his blood when made as an incident to and following his lawful arrest, evidenced by the issuance of a Uniform Traffic Ticket, for an offense defined in Section 11–501 of this Act [proscribing driving while intoxicated] or a similar provision of a municipal ordinance."

> ing of the notice, he shall request in writing a hearing thereon. . . .
>
> ". . . Such hearing shall proceed in the Court in the same manner as other civil proceedings, except that the scope of such proceedings shall cover only the issues of whether the person was placed under arrest for [driving while intoxicated], whether the arresting officer had reasonable grounds to believe that such person was driving while under the influence of intoxicating liquor, whether the person was informed orally and in writing as provided in paragraph (a) that his privilege to operate a motor vehicle would be suspended if he refused to submit to and complete the test and whether, after being so advised, he refused to submit to and complete the test upon request of the officer."[2]

Respondent Milton D. Batchelder was stopped while driving his automobile by an officer of the Peoria, Illinois, Police Department after the officer observed respondent driving in a reckless and erratic manner. After completing the stop, the officer approached respondent, determined that he was intoxicated, and arrested him on the charge of driving under the influence of intoxicating liquor. The officer thereafter requested that respondent take a breath-analysis test. Respondent refused. The officer then executed and filed a sworn statement that read in pertinent part:

> "I hereby certify that I have placed the above-named person under arrest, and that I had at the time of arrest reasonable grounds to believe that said person was driving a motor vehicle in this State while under the influ-

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[2] Two implied-consent statutes labeled ch. 95½, ¶ 11–501.1, were passed by the Illinois General Assembly on the same day. The Appellate Court of Illinois in this case relied on the version we have quoted in text and in n. 1, *supra*. In any event, the differences in language between the two statutes do not affect our analysis in this case. See Ill. Rev. Stat., ch. 1, ¶ 1105 (1981).

> ence of intoxicating liquor in that: TRAVELING TOO FAST IN ALLEY WITH PEDESTRIANS AROUND, CROSSED WALNUT W/O SLOWING, MAINTAINED SPEED BEHIND SLIPPER CLUB THEN PARKED ABRUPTLY BEHIND 519 S. W. ADAMS. I further certify that said person did willfully refuse to submit to the breath analyses when requested to do so in accordance with Section 11–501.1 of the Illinois Vehicle Code, after being informed of the possible consequences of his or her refusal." Pet. for Cert. 5–6.

To avoid having his license automatically suspended, respondent exercised his statutory right to request a hearing pursuant to ¶11–501.1(d).

Prior to taking evidence, the judge presiding at the hearing asked if there were any motions. Respondent's counsel moved to dismiss the officer's affidavit, quoted above, on the ground that it did not state any facts showing that respondent was under the influence of intoxicating liquor at the time of his arrest. The judge found that the affidavit did not comply with ¶11–501.1(d) because it failed to state facts showing that respondent was under the influence of intoxicating liquor at the time of his arrest. An order was entered denying the State's request for suspension of respondent's license.

The State appealed and the Appellate Court of Illinois, Third Judicial District, agreed with the trial court that the facts stated in the affidavit were insufficient to support the conclusion that respondent was intoxicated at the time he was arrested. 107 Ill. App. 3d 81, 437 N. E. 2d 364 (1982). The Appellate Court, however, held that the affidavit literally complied with the requirements of ¶11–501.1(d); that subsection requires only that the officer's affidavit state that he "had reasonable cause to believe the person was driving . . . while under the influence of intoxicating liquor." The affidavit nonetheless was deemed "insufficient . . . due to its failure to comport with the United States Constitution, specifically, the fourth and fourteenth amendments thereof." *Id.*, at 83, 437 N. E. 2d, at 366.

Relying on our decision in *Delaware* v. *Prouse*, 440 U. S. 648 (1979), the Appellate Court opined that "[t]he fourth and fourteenth amendments to the United States Constitution pertain to this situation because stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of those amendments . . . ." 107 Ill. App. 3d, at 84, 437 N. E. 2d, at 367. The court also relied on *Terry* v. *Ohio*, 392 U. S. 1 (1968), for the proposition that "[t]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's fourth amendment interests against its promotion of legitimate governmental interests." 107 Ill. App. 3d, at 84, 437 N. E. 2d, at 367. Applying this standard here, the Appellate Court held that ¶11–501.1(d) is constitutional only if it requires an arresting officer to set out, *in his affidavit* prepared pursuant to ¶11–501.1(d), "the underlying circumstances which provided him with a reasonable belief that the arrested person was driving under the influence of intoxicating liquor." *Ibid.*

In its application of the Federal Constitution to the Illinois implied-consent statute, the Appellate Court inexplicably failed to look to how this Court undertook a similar task in *Mackey* v. *Montrym*, 443 U. S. 1 (1979). In *Mackey*, we held that the Massachusetts statute mandating suspension of a driver's license because of his refusal to take a breath-analysis test upon arrest for driving under the influence of intoxicating liquor did not violate the Due Process Clause of the Fourteenth Amendment. The procedures provided for in the Illinois implied-consent statute are, if anything, even more solicitous of due process values than those we upheld in *Mackey*.

We noted in *Mackey* that "suspension of a driver's license for statutorily defined cause implicates a protectible property interest." *Id.*, at 10. There, as here, the only question presented was "what process is due to protect against an erroneous deprivation of that interest." *Ibid.*[3] We held that this question should be resolved by considering the following three factors:

> "'First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'" *Ibid.*, quoting *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976).

The analysis utilized in *Mackey* is equally applicable to and dispositive of this case.

First, the driver's interest in the continued possession and use of his license was recognized in *Mackey*. However, in undertaking the first step of the *Eldridge* balancing process in *Mackey*, our concern centered on "[t]he duration of any potentially wrongful deprivation of a property interest," 443 U. S., at 12. Under the Massachusetts statute, the license of a driver who refused to submit to a breath-analysis test was suspended pending the outcome of a hearing that he was entitled to demand. There is no concern or risk under the Illinois statute that a driver will be deprived of his license prior to a hearing. Paragraph 11–501.1(d) clearly grants a driver the right to have a hearing *before* his license is suspended. Thus, respondent can seek no solace in the first step of the *Eldridge* analysis.

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[3] The Appellate Court purported to rely on the Fourth, as well as the Fourteenth, Amendment. To the extent that there are Fourth Amendment interests at stake here, see *Delaware* v. *Prouse*, 440 U. S. 648, 662–663 (1979), they are amply protected so long as the officer who arrested respondent had "at least articulable and reasonable suspicion that . . . [respondent was] subject to seizure for violation of law . . . ." *Id.*, at 663. That fact would be determined at the hearing provided for under ¶11–501.1(d). The logical thrust of the Appellate Court's opinion is that respondent was somehow denied due process because the arresting officer's affidavit did not specify the grounds which led him to believe that respondent was driving under the influence of alcohol. We thus treat the Appellate Court's opinion as resting exclusively on due process grounds.

"[T]he second stage of the *Eldridge* inquiry requires consideration of the likelihood of an erroneous deprivation of the private interest involved as a consequence of the procedures used." *Mackey* v. *Montrym*, 443 U. S., at 13. In *Mackey*, we noted that "'something less than an evidentiary hearing is sufficient prior to adverse administrative action.'" *Ibid.*, quoting *Dixon* v. *Love*, 431 U. S. 105, 113 (1977). Clearly, then, the fact that ¶11–501.1(d) provides for a *predeprivation* hearing abundantly weights this second part of the *Eldridge* analysis in favor of the constitutionality of the Illinois implied-consent scheme.

"The third leg of the *Eldridge* balancing test requires us to identify the governmental function involved; also, to weigh in the balance the state interests served by the summary procedures used, as well as the administrative and fiscal burdens, if any, that would result from the substitute procedures sought." *Mackey* v. *Montrym*, *supra*, at 17. The interest of the States in depriving the drunk driver of permission to continue operating an automobile is particularly strong. We recently commented on "[t]he carnage caused by drunk drivers" in *South Dakota* v. *Neville*, 459 U. S. 553, 558 (1983). See also *Mackey* v. *Montrym*, *supra*, at 17–18; *Perez* v. *Campbell*, 402 U. S. 637, 657 and 672 (1971) (BLACKMUN, J., concurring); *Tate* v. *Short*, 401 U. S. 395, 401 (1971) (BLACKMUN, J., concurring); *Breithaupt* v. *Abram*, 352 U. S. 432, 439 (1957). Indeed, it is the effect of the Appellate Court's opinion on the Illinois effort to halt this "carnage" that has prompted our summary action in this case. That interest is substantially served by the procedures outlined in ¶11–501.1(d). Again, the fact that we upheld a more summary procedure in *Mackey* refutes the suggestion that the Illinois scheme runs afoul of the *Eldridge* test.

Accordingly, we conclude that the Constitution does not require arresting officers in Illinois, in enforcing that State's implied-consent statute, to recite in an affidavit the specific and concrete evidentiary matters constituting "the underlying circumstances which provided him with a reasonable belief that the arrested person was driving under the influence of intoxicating liquor." 107 Ill. App., at 84, 437 N. E. 2d, at 367. The driver's right to a hearing *before* he may be deprived of his license for failing to submit to a breath-analysis test accords him all of, and probably more than, the process that the Federal Constitution assures. The petition for certiorari is granted, the judgment of the Appellate Court of Illinois, Third Judicial District, is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

This case comes to us from an intermediate Illinois appellate court. It is a case that the Illinois Supreme Court declined to review. Its practical consequences concern the amount of detail that Illinois police officers in the Third Appellate District must include in an affidavit supporting a petition to suspend a driver's license. In final analysis the only question presented relates to how an Illinois statute is to be implemented in one part of the State. I suspect that the Illinois Supreme Court may have decided not to take this case because it preferred to address the question presented in a case in which both parties would be adequately represented.

The only paper filed in behalf of the losing party in this Court reads, in full, as follows:

> Court Clerk;
> Re: Illinois vs: Milton D. Batchelder
> No: 82-947
>
> In regard to your letter of 3-31-83 pertaining to the above captioned matter.

> I have a heart problem and am unemployed.
>
> I do not have the funds to hire an attorney.
>
> Is it possible for the court to appoint me counsel or for the court to rule on the record that is on appeal?
>
> I am unlearned at law and have had little formal education.
>
> Unless the court can give me some help I will not be able to pursue this matter.
>
> This letter written by;
> Donald E. Worlow
> 302 Pontiac Rd.
> Marquette Hgts., Ill. 61554
> For Milton D. Batchelder
> /s/ Milton Batchelder

If a case is important enough to merit a decision on the merits by this Court, I believe it also should be important enough to justify the appointment of counsel to represent the party defending the judgment of the court below. I respectfully dissent from the Court's summary disposition.

CALIFORNIA *v.* BEHELER

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

No. 82-1666. Decided July 6, 1983

After respondent called the police to report a homicide in which he was involved, he voluntarily accompanied them to the station house, having been told that he was not under arrest. At the station house, the police did not advise respondent of his rights under *Miranda* v. *Arizona*, 384 U. S. 436, and after an interview that lasted less than 30 minutes he was allowed to leave. He was arrested five days later and, after receiving *Miranda* warnings, gave a second confession during which he admitted that his earlier interview had been given voluntarily. Subsequently, respondent was convicted in a California state court for aiding and abetting first-degree murder, the court having admitted into evidence respondent's statements at both interviews. The California Court of Appeal reversed, holding that the first police interview constituted custodial interrogation, which activated the need for *Miranda* warnings.

Held: Miranda warnings were not required at respondent's first interview with the police. For *Miranda* purposes, "custodial interrogation" means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Respondent was neither taken into custody for the first interview nor significantly deprived of his freedom of action. Although the circumstances of each case must influence a determination of whether a suspect is "in custody," the ultimate inquiry is merely whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. *Miranda* warnings are not required simply because the questioning takes place in a coercive environment in the station house or because the questioned person is one whom the police suspect. Cf. *Oregon* v. *Mathiason*, 429 U. S. 492.

Certiorari granted; reversed and remanded.

PER CURIAM.

The question presented in this petition for certiorari is whether *Miranda* warnings are required if the suspect is not placed under arrest, voluntarily comes to the police station, and is allowed to leave unhindered by police after a brief interview. Because this question has already been settled clearly by past decisions of this Court, we reverse a decision of the California Court of Appeal holding that *Miranda* warnings are required in these circumstances.

I

The respondent, Jerry Beheler, and several acquaintances, attempted to steal a quantity of hashish from Peggy Dean, who was selling the drug in the parking lot of a liquor store. Dean was killed by Beheler's companion and stepbrother, Danny Wilbanks, when she refused to relinquish her hashish. Shortly thereafter, Beheler called the police, who arrived almost immediately. See Brief in Opposition 3. He told the police that Wilbanks had killed the victim, and that other companions had hidden the gun in the Behelers' backyard. Beheler gave consent to search the yard and the gun was found. Later that evening, Beheler voluntarily agreed to accompany police to the station house, although the police specifically told Beheler that he was not under arrest.

At the station house, Beheler agreed to talk to police about the murder, although the police did not advise Beheler of the rights provided him under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The interview lasted less than 30 minutes. After being told that his statement would be evaluated by the District Attorney, Beheler was permitted to return to his home. Five days later, Beheler was arrested in connection with the Dean murder. After he was fully advised of his *Miranda* rights, he waived those rights and gave a second, taped confession during which he admitted that his earlier interview with the police had been given voluntarily. The trial court found that it was not necessary for police to advise Beheler of his *Miranda* rights prior to the first interview, and Beheler's statements at both interviews were admitted into evidence.

The California Court of Appeal reversed Beheler's conviction for aiding and abetting first-degree murder, holding that the first interview with police constituted custodial interrogation, which activated the need for *Miranda* warnings. The court focused on the fact that the interview took place in the station house, that before the station house interview the police had already identified Beheler as a suspect in the case because Beheler had discussed the murder with police earlier, and that the interview was designed to produce incriminating responses. Although the indicia of arrest were not present, the balancing of the other factors led the court to conclude that the State "has not met its burden of establishing that [Beheler] was not in custody" during the first interview. App. to Pet. for Cert. 36.[1]

II

We held in *Miranda* that "[b]y custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U. S., at 444 (footnote omitted). It is beyond doubt that Beheler was neither taken into custody nor significantly deprived of his freedom of action. Indeed, Beheler's freedom was not restricted in any way whatsoever.

In *Oregon* v. *Mathiason*, 429 U. S. 492 (1977), which involved a factual context remarkably similar to the present case, we held that the suspect was not "in custody" within the meaning of *Miranda*. The police initiated contact with Mathiason, who agreed to come to the patrol office. There, the police conducted an interview after informing Mathiason that they suspected him of committing a burglary, and that the truthfulness of any statement that he made would be evaluated by the District Attorney or a judge. The officer also falsely informed Mathiason that his fingerprints were found at the scene of the crime. Mathiason then admitted to his participation in the burglary. The officer advised Mathiason of his *Miranda* rights, and took a taped confession, but released him pending the District Attorney's decision to bring formal charges. The interview lasted for 30 minutes.

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[1] Beheler suggests that the decision below rested upon adequate and independent state grounds in that the court applied state "in custody" standards. See Brief in Opposition 9, n. 5. It is clear from the face of the opinion, however, that the opinion below rested exclusively on the court's "decision on the *Miranda* issue." App. to Pet. for Cert. 37. Although the court relied in part on *People* v. *Herdan*, 42 Cal. App. 3d 300, 116 Cal. Rptr. 641 (1974), that decision applies *Miranda*.

In summarily reversing the Oregon Supreme Court decision that Mathiason was in custody for purposes of receiving *Miranda* protection, we stated: "Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.'" 429 U. S., at 495. The police are required to give *Miranda* warnings only "where there has been such a restriction on a person's freedom as to render him 'in custody.'" 429 U. S., at 495. Our holding relied on the very practical recognition that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." *Ibid.*[2]

The court below believed incorrectly that *Mathiason* could be distinguished from the present case because Mathiason was not questioned by police until some 25 days after the burglary. In the present case, Beheler was interviewed shortly after the crime was committed, had been drinking earlier in the day, and was emotionally distraught. See App. to Pet. for Cert. 24–25. In addition, the court observed that the police had a great deal more information about Beheler before their interview than did the police in *Mathiason,* and that Mathiason was a parolee who knew that "it was incumbent upon him to cooperate with police." App. to Pet. for Cert. 25. Finally, the court noted that our decision in *Mathiason* did not preclude a consideration of the "totality of circumstances" in determining whether a suspect is "in custody."

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[2] Our holding in *Mathiason* reflected our earlier decision in *Beckwith* v. *United States*, 425 U. S. 341 (1976), in which we rejected the notion that the "in custody" requirement was satisfied merely because the police interviewed a person who was the "focus" of a criminal investigation. We made clear that "*Miranda* implicitly defined 'focus' . . . as 'questioning initiated by law enforcement officers *after* a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *Id.*, at 347 (quoting *Miranda*, 384 U. S., at 444).

Although the circumstances of each case must certainly influence a determination of whether a suspect is "in custody" for purposes of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest. *Mathiason, supra,* at 495. In the present case, the "totality of circumstances" on which the court focused primarily were that the interview took place in a station house, and that Beheler was a suspect because he had spoken to police earlier. But we have explicitly recognized that *Miranda* warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." 429 U. S., at 495. That the police knew more about Beheler before his interview than they did about Mathiason before his is irrelevant, see n. 2, *supra,* especially because it was Beheler himself who had initiated the earlier communication with police. Moreover, the length of time that elapsed between the commission of the crime and the police interview has no relevance to the inquiry.[3]

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[3] Beheler offers a number of arguments in opposition to the State's petition for certiorari. The thrust of these arguments is that even though he voluntarily engaged in the interview with police, his participation was "coerced" because he was unaware of the consequences of his participation. Beheler cites no authority to support his contention that his lack of awareness transformed the situation into a custodial one. In addition, Beheler argues that it would be unjust to uphold his conviction because the triggerman was convicted only of voluntary manslaughter. We do not find

III

Accordingly, the motion of respondent for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted, the judgment of the California Court of Appeal is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

This case comes to us from an intermediate appellate court in California. It is a case that the Supreme Court of California deemed unworthy of review. It is a case in which the California Court of Appeal wrote a 38-page opinion, most of which was devoted to an analysis of the question whether, under all of the relevant facts, the respondent was "in custody" under the test set forth in *People* v. *Blouin*, 80 Cal. App. 3d 269, 283, 145 Cal. Rptr. 701, 707–708 (1978).

In reviewing that question, the California court analyzed the facts of the case in light of the decisions in *People* v. *Herdan*, 42 Cal. App. 3d 300, 116 Cal. Rptr. 641 (1974); *People* v. *Hill*, 70 Cal. 2d 678, 452 P. 2d 329 (1969); *People* v. *Arnold*, 66 Cal. 2d 438, 426 P. 2d 515 (1967); *People* v. *White*, 69 Cal. 2d 751, 446 P. 2d 993 (1968); *People* v. *Sam*, 71 Cal. 2d 194, 454 P. 2d 700 (1969); *In re James M.*, 72 Cal. App. 3d 133, 139 Cal Rptr. 902 (1977); *People* v. *McClary*, 20 Cal. 3d 218, 571 P. 2d 620 (1977); *People* v. *Randall*, 1 Cal. 3d 948, 464 P. 2d 114 (1970); and *People* v. *Howard*, 5 Crim. No. 5181 (Cal. App., July 16, 1982). The court also considered and distinguished our opinions in *Rhode Island* v. *Innis*, 446 U. S. 291 (1980), and *Oregon* v. *Mathiason*, 429 U. S. 492 (1977). The court summarized its analysis in the following manner:

Beheler's argument to be persuasive. See *Standefer* v. *United States*, 447 U. S. 10 (1980).

> "As we have previously stated, the prosecution has the burden of establishing a *[sic]* voluntariness of the defendant's statement beyond a reasonable doubt. (*People* v. *Jimenez*, [21 Cal. 3d 595, 580 P. 2d 672 (1978)].) In the instant case, there appears to be no conflicting testimony on the *Miranda* issue. Where the facts are uncontradicted, the appellate court must independently determine beyond a reasonable doubt that the incriminating statement was properly admitted. (*People* v. *Murtishaw*, [29 Cal. 3d 733, 753, 631 P. 2d 446, 457 (1981)].)
>
> "We conclude that respondent has not met its burden of establishing that appellant was not in custody during the February 21 interview. Furthermore, the incriminating statements from the February 21 interview should have been suppressed by the trial court. On the record before us, appellant essentially confessed to felony murder during the February 21 interrogation. A confession has been defined as 'amounting to a declaration of defendant's intentional participation in a criminal act.' (*People* v. *McClary*, [20 Cal. 3d 218, 230, 571 P. 2d 620, 627 (1977)].) The improper introduction of a confession is reversible error per se. (*People* v. *Randall*, [1 Cal. 3d 948, 958, 464 P. 2d 114, 120–121 (1970)].)" App. to Pet. for Cert. 36–37.

Today, without receiving briefs or arguments on the merits, this Court summarily reverses the decision of the intermediate appellate court of California. In doing so the Court notes that "the circumstances of each case must certainly influence a determination of whether a suspect is 'in custody'" and that the ultimate inquiry is whether the restraint on freedom of movement is "of the degree associated with a formal arrest." *Ante*, at 1125. I believe that other courts are far better equipped than this Court to make the kind of factual study that must precede such a determination. We are far too busy to review every claim of error by a prosecutor who has been unsuccessful in presenting his case to a state appellate court. Moreover, those courts are far better equipped than we are to assess the police practices that are highly relevant to the determination whether particular circumstances amount to custodial interrogation. I therefore respectfully dissent from the Court's summary decision of the merits of this case.

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Reporter's Note

The next page is purposely numbered 1201. The numbers between 1128 and 1201 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM JUNE 27 THROUGH SEPTEMBER 27, 1983

JUNE 27, 1983

Appeals Dismissed

No. 82–1745. PASCOE *v.* KUEHNAST. Appeal from Ct. App. Tex., 10th Sup. Jud. Dist., dismissed for want of jurisdiction. Reported below: 642 S. W. 2d 37.

No. 82–6726. NEAL *v.* ALABAMA. Appeal from D. C. N. D. Ala. dismissed for want of jurisdiction.

Vacated and Remanded on Appeal

No. 82–268. FIRST PENNSYLVANIA BANK, N. A. *v.* LANCASTER COUNTY TAX CLAIM BUREAU ET AL. Appeal from Sup. Ct. Pa. Judgment vacated and case remanded for further consideration in light of *Mennonite Board of Missions* v. *Adams*, 462 U. S. 791 (1983). Reported below: 498 Pa. 122, 445 A. 2d 97.

Certiorari Granted—Vacated and Remanded

No. 81–307. WEST *v.* UNITED STATES. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Place*, 462 U. S. 696 (1983). Reported below: 651 F. 2d 71.

No. 81–935. JEFFBOAT, INC. *v.* ROBERTSON, ADMINISTRATOR. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U. S. 523 (1983). Reported below: 651 F. 2d 434.

No. 82–650. PAVLAK *v.* CHURCH, CHIEF OF POLICE FOR THE CITY OF BOISE, ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Crown, Cork & Seal Co.* v. *Parker*, 462 U. S. 345 (1983); and *Chardon* v. *Fumero Soto*, 462 U. S. 650 (1983). Reported below: 681 F. 2d 617.

No. 82–667. FLORIDA *v.* ZAFRA. Dist. Ct. App. Fla., 3d Dist. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Villamonte-Marquez*, 462 U. S. 579 (1983). Reported below: 408 So. 2d 745.

No. 82–674. UNITED STATES *v.* BEALE. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Place*, 462 U. S. 696 (1983). Reported below: 674 F. 2d 1327.

No. 82–853. RUSSELL CREEK LAND CO. ET AL. *v.* CHARJUAN, INC. Cir. Ct. W. Va., Cabell County. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mennonite Board of Missions* v. *Adams*, 462 U. S. 791 (1983).

No. 82–948. ILLINOIS *v.* BEAN. App. Ct. Ill., 3d Dist. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Illinois* v. *Lafayette*, 462 U. S. 640 (1983). Reported below: 107 Ill. App. 3d 662, 437 N. E. 2d 1295.

No. 82–1006. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* LOCKHEED MISSILES & SPACE CO., INC. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669 (1983). Reported below: 680 F. 2d 1243.

No. 82–1365. CONTINENTAL INSURANCE CO. *v.* MOSELEY, EXECUTRIX OF THE ESTATE OF OLIVER, ET AL. Sup. Ct. Nev. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mennonite Board of Missions* v. *Adams*, 462 U. S. 791 (1983). Reported below: 98 Nev. 476, 653 P. 2d 158.

No. 82–1857. **Washington** *v.* **Bartholomew.** Sup. Ct. Wash. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Zant* v. *Stephens*, 462 U. S. 862 (1983). Justice Brennan and Justice Marshall would deny certiorari. Reported below: 98 Wash. 2d 173, 654 P. 2d 1170.

Miscellaneous Orders

No. — – ——. **Detenber et al.** *v.* **Turnage, Director, Selective Service System, et al.** Motion to direct the Clerk to file the petition for writ of certiorari out of time denied.

No. A–1000. **Abravaya** *v.* **United States.** C. A. 11th Cir. Application for stay, presented to Justice Stevens, and by him referred to the Court, denied.

No. A–1002 (82–2045). **Committee to Preserve American Color Television, aka COMPACT, et al.** *v.* **United States.** Application to continue the injunction entered by the United States Court of Appeals for the Federal Circuit, presented to Justice Brennan, and by him referred to the Court, denied.

No. D–334. **In re Disbarment of Aglow.** Disbarment entered. [For earlier order herein, see 461 U. S. 902.]

No. D–353. **In re Disbarment of Greene.** It having been reported to the Court that Raymond T. Greene died November 5, 1982, the rule to show cause, heretofore issued on June 6, 1983 [462 U. S. 1103], is hereby discharged.

No. D–354. **In re Disbarment of Connolly.** Robert John Connolly, of Tacoma, Wash., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on June 6, 1983 [462 U. S. 1103], is hereby discharged.

No. D–364. IN RE DISBARMENT OF DOWNES. It is ordered that John P. Downes, of Oxon Hill, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 80, Orig. COLORADO *v.* NEW MEXICO ET AL. Report of the Special Master containing additional factual findings requested by order of Court is received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Replies to the Exceptions, with supporting briefs, may be filed within 30 days. [For earlier order herein, see, *e. g.*, 459 U. S. 1229.]

No. 86, Orig. LOUISIANA *v.* MISSISSIPPI ET AL. Report of the Special Master is received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Replies to the Exceptions, with supporting briefs, may be filed within 30 days. [For earlier order herein, see, *e. g.*, 454 U. S. 937.]

No. 81–1304. NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS *v.* UNITED STATES POSTAL SERVICE ET AL.; and

No. 81–1381. UNITED PARCEL SERVICE OF AMERICA, INC. *v.* UNITED STATES POSTAL SERVICE ET AL., 462 U. S. 810. Motion of the Solicitor General for leave to file a supplemental brief after argument granted.

No. 81–2332. NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY *v.* CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF VIRGINIA ET AL. C. A. 4th Cir. [Certiorari granted, 459 U. S. 1145.] Motion of respondent Brooklyn Union Gas Co. for leave to file a brief as *amicus curiae* granted. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 82-914. **Monsanto Co.** *v.* **Spray-Rite Service Corp.** C. A. 7th Cir. [Certiorari granted, 460 U. S. 1010.] Motion of Associates for Antitrust Analysis for leave to file a brief as *amicus curiae* granted. JUSTICE WHITE took no part in the consideration or decision of this motion.

No. 82-1401. **Calder et al.** *v.* **Jones.** Ct. App. Cal., 2d App. Dist. [Probable jurisdiction postponed, 460 U. S. 1080.] Motions of Reporters Committee for Freedom of the Press et al. and Association of American Publishers, Inc., for leave to file briefs as *amici curiae* granted.

No. 82-6675. **Gilliam** *v.* **2201 Boardwalk Corp. et al.** C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 18, 1983, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 82-6702. **Ganey** *v.* **Safron et al.** C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 18, 1983, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 82-6827. **Pettee** *v.* **Kilpatrick et al.** C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 18, 1983, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 82-6858. **In re Wassall.** Petition for writ of habeas corpus denied.

Certiorari Granted

No. 82-963. **Massachusetts** *v.* **Sheppard.** Sup. Jud. Ct. Mass. Certiorari granted. Reported below: 387 Mass. 488, 441 N. E. 2d 725.

No. 82-1616. UNITED STATES *v.* WEBER AIRCRAFT CORP. ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 688 F. 2d 638.

No. 82-1771. UNITED STATES *v.* LEON ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 701 F. 2d 187.

No. 82-1772. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* RINGER ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 697 F. 2d 1291.

No. 82-1479. JUSTICES OF BOSTON MUNICIPAL COURT *v.* LYDON. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 698 F. 2d 1.

No. 82-1711. COLORADO *v.* QUINTERO. Sup. Ct. Colo. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 657 P. 2d 948.

No. 82-1630. HUDSON *v.* PALMER; and

No. 82-6695. PALMER *v.* HUDSON. C. A. 4th Cir. Motions of Russell Thomas Palmer for leave to proceed *in forma pauperis* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 697 F. 2d 1220.

Certiorari Denied

No. 81-2328. HELLENIC LINES LTD. *v.* FANETTI. C. A. 2d Cir. Certiorari denied. Reported below: 678 F. 2d 424.

No. 82-643. O'LEARY *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 417 So. 2d 232.

No. 82-1229. LOVELL ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 689 F. 2d 191.

No. 82-1276. DIAMOND M DRILLING CORP. *v.* TARLTON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 688 F. 2d 973.

No. 82-1507. WASHINGTON STATE DEPARTMENT OF GAME *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 694 F. 2d 188.

No. 82-1510. GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT *v.* HORTON, AS NEXT FRIEND OF HORTON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 690 F. 2d 470 and 693 F. 2d 524.

No. 82-1584. SCHELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 707 F. 2d 1397.

No. 82-1679. ALBERDING *v.* DONOVAN, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 695 F. 2d 190.

No. 82-1690. LEE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 703 F. 2d 571.

No. 82-1728. DAVID METZGER TRUST ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 693 F. 2d 459.

No. 82-1737. ELLIS BANKING CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 688 F. 2d 1376.

No. 82-1756. BAKER ET AL. *v.* WISCONSIN. C. A. 7th Cir. Certiorari denied. Reported below: 698 F. 2d 1323.

No. 82-1779. HOFFMAN *v.* MINNESOTA LAWYERS PROFESSIONAL RESPONSIBILITY BOARD. Sup. Ct. Minn. Certiorari denied.

No. 82-1780. BURLINGTON NORTHERN INC. *v.* DONOVAN, SECRETARY OF LABOR. C. A. 9th Cir. Certiorari denied. Reported below: 694 F. 2d 1213.

No. 82-1784. TROY STATE UNIVERSITY ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 11th Cir. Certiorari denied. Reported below: 693 F. 2d 1353.

No. 82–1789. PRUDENTIAL INSURANCE COMPANY OF AMERICA *v.* GIBRALTAR FINANCIAL CORPORATION OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 694 F. 2d 1150.

No. 82–1794. FRITZ *v.* HAGERSTOWN REPRODUCTIVE HEALTH SERVICES ET AL. Ct. App. Md. Certiorari denied. Reported below: 295 Md. 268, 454 A. 2d 846.

No. 82–1797. NORTHERN PUBLISHING CO., INC., DBA ANCHORAGE DAILY NEWS *v.* GREEN. Sup. Ct. Alaska. Certiorari denied. Reported below: 655 P. 2d 736.

No. 82–1798. DRIGGERS ET AL. *v.* SOUTHERN COOPERATIVE DEVELOPMENT FUND ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 696 F. 2d 1347.

No. 82–1802. FIRST NATIONAL BANK OF TEKAMAH, NEBRASKA *v.* HANSEN ET UX. C. A. 8th Cir. Certiorari denied. Reported below: 702 F. 2d 728.

No. 82–1803. AVEDISIAN *v.* RAMSEY ET AL. Ct. App. Md. Certiorari denied. Reported below: 295 Md. 301.

No. 82–1804. MUELLER *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE (CALIFORNIA, REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 82–1810. DILLARD ET UX. *v.* BROYLES ET AL. Ct. App. Tex., 13th Sup. Jud. Dist. Certiorari denied. Reported below: 633 S. W. 2d 636.

No. 82–1830. BROWN ET AL. *v.* JOHNSTON, POLK COUNTY ATTORNEY, ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 328 N. W. 2d 510.

No. 82–1837. BURT REALTY CO. ET AL. *v.* DOUGHERTY COUNTY BOARD OF TAX ASSESSORS. Sup. Ct. Ga. Certiorari denied. Reported below: 250 Ga. 467, 298 S. E. 2d 475.

No. 82–1847. Strickland, as Personal Representative of Strickland *v.* Roosevelt County Rural Electric Cooperative et al. Ct. App. N. M. Certiorari denied. Reported below: 99 N. M. 335, 657 P. 2d 1184.

No. 82–1850. Washington Wildlife Preservation, Inc., et al. *v.* Minnesota Department of Natural Resources et al. Sup. Ct. Minn. Certiorari denied. Reported below: 329 N. W. 2d 543.

No. 82–1852. Adamsons *v.* American Airlines. Ct. App. N. Y. Certiorari denied. Reported below: 58 N. Y. 2d 42, 444 N. E. 2d 21.

No. 82–1878. David *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 708 F. 2d 729.

No. 82–1887. Shelton *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 703 F. 2d 578.

No. 82–1891. San Diego County Association for the Retarded *v.* National Labor Relations Board. C. A. 9th Cir. Certiorari denied. Reported below: 705 F. 2d 467.

No. 82–1912. Brown *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 428 So. 2d 250.

No. 82–1924. Sena *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1511.

No. 82–1926. Kopituk et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 690 F. 2d 1289.

No. 82–1933. Dabeit *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 699 F. 2d 1161.

No. 82–1937. Rodriguez-Ramos *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 704 F. 2d 17.

No. 82–1940. I. S. Joseph Co., Inc., et al. *v.* Partrederiet Lista et al. Sup. Ct. Minn. Certiorari denied.

No. 82-1941. GREENE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 697 F. 2d 1229.

No. 82-1955. GAVIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 692 F. 2d 1352.

No. 82-1957. FINAZZO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 704 F. 2d 300.

No. 82-1958. PHILPOT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 704 F. 2d 1250.

No. 82-5491. WALTZER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 682 F. 2d 370.

No. 82-6256. FRANKENBERRY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 696 F. 2d 986.

No. 82-6297. BRADSHAW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 690 F. 2d 704.

No. 82-6301. FRANKENBERRY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 696 F. 2d 239.

No. 82-6332. CATHEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 169.

No. 82-6377. SCOTT *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 695 F. 2d 916.

No. 82-6426. STAHL *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 426 So. 2d 917.

No. 82-6455. NIEB *v.* MARSHALL. C. A. 6th Cir. Certiorari denied. Reported below: 695 F. 2d 228.

No. 82-6599. HANCE *v.* ZANT, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 696 F. 2d 940.

No. 82-6618. BOTHWELL *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 250 Ga. 573, 300 S. E. 2d 126.

No. 82-6664. SHABAZZ *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 82-6665. CARRUTHERS *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 82-6667. SMITH *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 306 Pa. Super. 599, 452 A. 2d 49.

No. 82-6670. HINES *v.* ENOMOTO, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 703 F. 2d 575.

No. 82-6671. GIBSON *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 164.

No. 82-6673. WATKINS *v.* LAWS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 170.

No. 82-6677. HOLSTON *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 82-6680. WALTERS *v.* GAUL, TREASURER, CUYAHOGA COUNTY, ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 82-6684. BRADLEY *v.* DAVIS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 705 F. 2d 441.

No. 82-6685. HOLCOMB *v.* MURPHY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 701 F. 2d 1307.

No. 82-6687. JOHNSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 82-6690. STUTZMAN *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 510.

No. 82-6698. BATCHELOR *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 693 F. 2d 859.

No. 82-6700. LANGLEY *v.* ALLSBROOK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 508.

No. 82-6703. HOLLOWAY *v.* LUKHARD, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF WELFARE. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 2d 165.

No. 82-6707. SANCHEZ-SANCHEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 82-6718. PLAYER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 82-6791. BARTHOLOMEW *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 98 Wash. 2d 173, 654 P. 2d 1170.

No. 82-6796. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 706 F. 2d 143.

No. 82-6799. WASHINGTON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 82-6800. RUIP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 705 F. 2d 468.

No. 82-6802. WESCOTT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 701 F. 2d 136.

No. 82-6805. COVINGTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1510.

No. 82-6806. JONES *v.* FARM CREDIT ADMINISTRATION. C. A. 8th Cir. Certiorari denied. Reported below: 702 F. 2d 160.

No. 82-6812. MAGHE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 710 F. 2d 503.

No. 82–6815. **Amick** *v.* **United States.** C. A. 4th Cir. Certiorari denied. Reported below: 705 F. 2d 446.

No. 82–6818. **Ross** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1511.

No. 82–6834. **Gometz** *v.* **Miller, Warden.** C. A. 7th Cir. Certiorari denied. Reported below: 705 F. 2d 462.

No. 82–6839. **Harris** *v.* **United States.** C. A. 7th Cir. Certiorari denied. Reported below: 705 F. 2d 462.

No. 82–6847. **Scott** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1511.

No. 82–6859. **Bartos** *v.* **Florida.** Sup. Ct. Fla. Certiorari denied. Reported below: 427 So. 2d 736.

No. 82–6861. **Byrd** *v.* **United States.** Ct. App. D. C. Certiorari denied.

No. 82–6863. **Johnson** *v.* **United States.** C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1510.

No. 82–6875. **Minicozzi** *v.* **United States.** Ct. App. D. C. Certiorari denied.

No. 81–1772. **Martell et al.** *v.* **United States.** C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari, vacate the judgment, and remand for further consideration in light of *United States* v. *Place*, 462 U. S. 696 (1983). Reported below: 654 F. 2d 1356.

No. 81–5240. **Gates** *v.* **Zant, Superintendent, Georgia Diagnostic and Classification Center.** Super. Ct. Ga., Butts County;
No. 81–5312. **Stephens** *v.* **Georgia.** Sup. Ct. Ga.;
No. 81–5947. **Waters** *v.* **Georgia.** Sup. Ct. Ga.;
No. 81–5962. **Taylor** *v.* **North Carolina.** Sup. Ct. N. C.;
No. 81–6827. **Redd** *v.* **Zant, Warden.** Sup. Ct. Ga.;

No. 82-5128. **Mathis** *v.* **Georgia.** Sup. Ct. Ga.;

No. 82-5260. **Moore** *v.* **Louisiana.** Sup. Ct. La.;

No. 82-5868. **Williams** *v.* **Maggio, Warden, et al.** C. A. 5th Cir.; and

No. 82-6192. **Roberts** *v.* **South Carolina.** Sup. Ct. S. C. Certiorari denied. Reported below: No. 81-5312, 247 Ga. 698, 278 S. E. 2d 398; No. 81-5947, 248 Ga. 355, 283 S. E. 2d 238; No. 81-5962, 304 N. C. 249, 283 S. E. 2d 761; No. 81-6827, 249 Ga. 211, 290 S. E. 2d 36; No. 82-5128, 249 Ga. 454, 291 S. E. 2d 489; No. 82-5260, 414 So. 2d 340; No. 82-5868, 679 F. 2d 381; No. 82-6192, 278 S. C. 572, 300 S. E. 2d 63.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 82-1755. **Branche et al.** *v.* **Freeman.** C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Justice Brennan would grant certiorari. Reported below: 695 F. 2d 485.

No. 82-1777. **Harris et al.** *v.* **United States.** C. A. 4th Cir. Motion of petitioner John Lester Harris for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 701 F. 2d 1095.

No. 82-1808. **Nebraska ex rel. Mercurio** *v.* **Board of Regents of the University of Nebraska.** Sup. Ct. Neb. Certiorari denied. Justice Blackmun took no part in the consideration or decision of this petition. Reported below: 213 Neb. 251, 329 N. W. 2d 87.

No. 82-1816. **Ohio** *v.* **Liberatore.** Sup. Ct. Ohio. Certiorari denied. Justice O'Connor would grant certiorari and summarily reverse the judgment of the Supreme Court of Ohio. Reported below: 4 Ohio St. 3d 13, 445 N. E. 2d 1116.

No. 82–2006. VELIOTIS *v.* UNITED STATES; and

No. 82–2015. DAVIS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Motion of the Solicitor General to expedite consideration of the petitions for writs of certiorari granted. Certiorari denied. Reported below: 702 F. 2d 418.

No. 82–2011. MARC RICH & CO. A.G. *v.* UNITED STATES. C. A. 2d Cir. Motion of the Solicitor General to expedite consideration of the petition for writ of certiorari granted. Certiorari denied. Reported below: 707 F. 2d 663.

Rehearing Denied

No. 81–1536. COMMISSIONER OF INTERNAL REVENUE *v.* TUFTS ET AL., 461 U. S. 300; and

No. 82–6439. REITER *v.* HUFFMAN, SHERIFF, 461 U. S. 934. Petitions for rehearing denied.

No. 81–2124. BOSTON ASSOCIATION OF SCHOOL ADMINISTRATORS & SUPERVISORS, AFL–CIO *v.* MORGAN ET AL., 459 U. S. 827. Motion for leave to file petition for rehearing denied.

No. 81–2306. LOCAL 66, BOSTON TEACHERS UNION, AFT, AFL–CIO *v.* BOSTON SCHOOL COMMITTEE ET AL., 459 U. S. 881 and 1059. Motion for leave to file second petition for rehearing denied.

JUNE 29, 1983

Miscellaneous Order

No. A–1033. SELECTIVE SERVICE SYSTEM ET AL. *v.* DOE ET AL. Application for stay of the order of the United States District Court for the District of Minnesota entered on June 16, 1983, case Nos. 3–82 Civ. 1670 and 3–83 Civ. 100, presented to JUSTICE BLACKMUN, and by him referred to the Court, granted pending the timely docketing and final disposition of the appeal in this Court.

JULY 1, 1983

Miscellaneous Order. (See No. 81–2147, *ante*, at 571–572, n. 22.)

July 6, 1983

Affirmed on Appeal

No. 81-2008. Process Gas Consumers Group et al. Consumer Energy Council of America et al.;

No. 81-2020. Interstate Natural Gas Associatio of America et al. *v.* Consumer Energy Council o America et al.;

No. 81-2151. Petrochemical Energy Group *v.* Consumer Energy Council of America et al.;

No. 81-2171. American Gas Assn. *v.* Consume Energy Council of America et al.;

No. 82-177. United States Senate *v.* Consume Energy Council of America et al.;

No. 82-209. United States House of Representatives *v.* Consumer Energy Council of America et al.

No. 82-935. United States Senate *v.* Federal Trade Commission et al.; and

No. 82-1044. United States House of Representatives *v.* Federal Trade Commission et al. C. A. D. C. Cir. Judgment in Nos. 81-2008, 81-2020, 81-2151, and 81-2171 affirmed. Justice Rehnquist would note probable jurisdiction and set cases for oral argument. Justice Powell took no part in the consideration or decision of these appeals. Certiorari in Nos. 82-177 and 82-209 denied. Justice Powell took no part in the consideration or decision of these petitions. Judgment in Nos. 82-935 and 82-1044 affirmed. Justice Rehnquist would note probable jurisdiction and set cases for oral argument. Motion of Charles Pashayan, Jr., et al. for leave to file a brief as *amicus curiae* in No. 82-1044 granted. Reported below: Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177, and 82-209, 218 U. S. App. D. C. 34, 673 F. 2d 425; Nos. 82-935 and 82-1044, 223 U. S. App. D. C. 386, 691 F. 2d 575.

JUSTICE WHITE, dissenting.

The principal issue in these cases is the constitutionality of the legislative veto as applied to agency rulemaking. Given the Court's recent decision in *INS* v. *Chadha*, 462 U. S. 919 (1983), the summary affirmance of the Court of Appeals' decisions striking the veto as unconstitutional is hardly surprising. These cases illustrate the constitutional myopia of the *Chadha* reasoning as applied to independent regulatory agencies and cast further light on the destructiveness of the *Chadha* holding.

In *Process Gas Consumers Group* v. *Consumer Energy Council of America*, 218 U. S. App. D. C. 34, 673 F. 2d 425 (1982), the Court of Appeals invalidated the one-House legislative veto provision of the Natural Gas Policy Act of 1978 (NGPA), contained in § 202(c) of the Act, 92 Stat. 3372, 15 U. S. C. § 3342(c) (1982 ed.). The NGPA was a response to the need for financial incentives to encourage the production of natural gas for the interstate market. The Act was a compromise, reached only after months of impasse between the two Houses over the optimal means of deregulating natural gas prices while preventing excessive fuel bills for consumers and industry. Congress finally settled on a phased deregulation of natural gas prices, with a system of incremental pricing to ease the transition. Specifically, the compromise agreed to by the Conference Committee provided for an initial experiment with incremental pricing for a small class of industrial users, while authorizing the Federal Energy Regulatory Commission to propose expansion of incremental pricing to other industrial users at a later time. This proposal would be submitted to Congress and would become effective unless disapproved by either House. The veto provision was central to this accommodation, because it allowed the Congress to observe the effects of the initial phase of incremental pricing without committing the Nation to a broader program which, it was feared, would drive industrial gas users to oil, increasing the demand for imported oil, and raising the cost of gas for residential consumers. The Conference solution allowed the House and Senate to reach agreement and the NGPA was enacted.*

In *United States Senate* v. *FTC*, 223 U. S. App. D. C. 386, 691 F. 2d 575 (1982), the Court of Appeals struck down § 21(a) of the Federal Trade Commission Improvements Act of 1980, 94 Stat. 393, 15 U. S. C. § 57a–1 (1982 ed.), which provides that an FTC trade regulation rule shall become effective unless both Houses of Congress disapprove it. The Act authorizes the Commission to issue trade regulation rules which define unfair or deceptive acts or practices in or affecting commerce. 15 U. S. C. § 57a(a)(1)(B) (1982 ed.). For three years, Congress debated the breadth of the Commission's rulemaking authority, noting that the FTC could, pursuant to the Act, "regulate virtually every aspect of America's commercial life." 124 Cong. Rec. 5012 (1978) (Rep. Broyhill). The two-House veto provision was settled upon as a means of allowing Congress to study and review the broad and important policy pronouncements of the Commission.

I cannot agree that the legislative vetoes in these cases violate the requirements of Art. I of the Constitution. Where the veto is placed as a check upon the actions of the independent regulatory agencies, the Art. I analysis relied upon in *Chadha* has a particularly hollow ring. In *Buckley* v. *Valeo*, 424 U. S. 1 (1976), I set forth my belief that the legislative veto as applied to rules promulgated by an independent regulatory agency fully comports with the Constitution.

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*These cases also present the important question of whether the legislative veto is severable from the authorization for FERC to issue an expanded interim pricing rule. There is no severability clause in the NGPA, an omission which itself suggests the inseverability of the provision, see *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 313 (1936), and much of the legislative history suggests that Congress would not have granted the Commission unfettered rulemaking authority. See, *e. g.*, 124 Cong. Rec. 29662–29663 (1978) (comments of Sen. Percy).

> "[F]or a regulation to become effective, neither House need approve it, pass it, or take any action at all with respect to it. The regulation becomes effective by non-action. This no more invades the President's powers than does a regulation not required to be laid before Congress. Congressional influence over the substantive content of agency regulation may be enhanced, but I would not view the power of either House to disapprove as equivalent to legislation or to an order, resolution, or vote requiring the concurrence of both Houses." *Id.*, at 284–285.
>
> "Disapproval nullifies the suggested regulation and prevents the occurrence of any change in the law. The regulation is void. Nothing remains on which the veto power could operate. It is as though a bill passed in one House and failed in another." *Id.*, at 285, n. 30.

The Court's opinion in *Chadha* has not convinced me otherwise. Congress, with the President's consent, characteristically empowers the agencies to issue regulations. These regulations have the force of law without the President's concurrence; nor can he veto them if he disagrees with the law that they make. The President's authority to control independent agency lawmaking, which on a day-to-day basis is nonexistent, could not be affected by the existence or exercise of the legislative veto. To invalidate the device, which allows Congress to maintain some control over the lawmaking process, merely guarantees that the independent agencies, once created, for all practical purposes are a fourth branch of the Government not subject to the direct control of either Congress or the Executive Branch. I cannot believe that the Constitution commands such a result. For these reasons and for those expressed in my dissenting opinion in *INS* v. *Chadha*, I respectfully dissent.

No. 82–1080. SIMON ET AL. *v.* DAVIS, SECRETARY OF COMMONWEALTH OF PENNSYLVANIA, ET AL. Affirmed on appeal from D. C. M. D. Pa. JUSTICE BRENNAN, JUSTICE

MARSHALL, and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 567 F. Supp. 1507.

No. 82–1085. ARCUDI, CHAIRMAN, BOARD OF COMPENSATION COMMISSIONERS OF CONNECTICUT, ET AL. *v.* STONE & WEBSTER ENGINEERING CORP. ET AL. Affirmed on appeal from C. A. 2d Cir. Reported below: 690 F. 2d 323.

Appeals Dismissed

No. 81–349. CHICAGO BRIDGE & IRON CO. *v.* CATERPILLAR TRACTOR CO. ET AL. Sup. Ct. Ill. [Probable jurisdiction noted, 454 U. S. 1029.*] Appeal dismissed for want of

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*[REPORTER'S NOTE: Argued April 19, 1982. *William P. Sutter* argued the cause for appellant. With him on the briefs were *Richard Bromley*, *Charlotte Crane*, and *Sam DeFrank*.

Stuart A. Smith argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief was *Solicitor General Lee*.

Don S. Harnack argued the cause for appellees Caterpillar Tractor Co. et al. With him on the brief were *Lawrence H. Jacobson* and *Richard A. Hanson*. *John D. WhiteNack*, Special Assistant Attorney General of Illinois, argued the cause for appellee State of Illinois. With him on the briefs were *Tyrone C. Fahner*, Attorney General, and *Lloyd B. Foster*.

Briefs of *amici curiae* urging reversal were filed for the Committee on State Taxation of the Council of State Chambers of Commerce by *George S. Koch*, *James H. Peters*, and *Paul H. Frankel;* for Container Corporation of America by *Franklin C. Latcham* and *Prentiss Willson, Jr.;* for Charles A. Legge et al. by *Charles A. Legge* and *Jeffrey G. Balkin, pro se;* and for the Multistate Tax Commission et al. by *William D. Dexter*; *Wilson L. Condon*, Attorney General of Alaska; *J. D. MacFarlane*, Attorney General of Colorado; *Carl R. Ajello*, Attorney General of Connecticut; *Richard S. Gebelein*, Attorney General of Delaware; *David H. Leroy*, Attorney General of Idaho, and *Theodore V. Spangler, Jr.*, Deputy Attorney General; *Tyrone C. Fahner*, Attorney General of Illinois; *Linley E. Pearson*, Attorney General of Indiana; *Robert T. Stephan*, Attorney General of Kansas; *Francis X. Bellotti*, Attorney General of Massachusetts; *Frank J. Kelley*, Attorney General of Michigan; *Warren R. Spannaus*, Attorney General of Minnesota; *John Ashcroft*, Attorney General of Missouri; *Paul L. Douglas*, Attorney General of Nebraska; *Gregory H. Smith*, Attorney General of New Hampshire; *Jeff Bingaman*, Attorney General of New Mexico; *Rufus L. Edmisten*, Attorney General of North Carolina, and substantial federal question. JUSTICE STEVENS took no part in the consideration or decision of this case.

No. 82-298. ANACONDA CO. *v.* FRANCHISE TAX BOARD OF CALIFORNIA. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. Reported below: 130 Cal. App. 3d 15, 181 Cal. Rptr. 640.

Vacated and Remanded on Appeal

No. 81-1834. BARTOW COUNTY BANK ET AL. *v.* BARTOW COUNTY BOARD OF TAX ASSESSORS ET AL. Appeal from Sup. Ct. Ga. Judgment vacated and case remanded for further consideration in light of *American Bank & Trust Co.* v. *Dallas County, ante*, p. 855. Reported below: 248 Ga. 703, 285 S. E. 2d 920.

No. 82-299. METROPOLITAN LIFE INSURANCE CO. *v.* MASSACHUSETTS; and

No. 82-300. TRAVELERS INSURANCE CO. *v.* MASSACHUSETTS. Appeals from Sup. Jud. Ct. Mass. Judgment va-

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M. C. Banks, Deputy Attorney General; *Robert O. Welfald*, Attorney General of North Dakota, and *Albert R. Hausauer*, Assistant Attorney General; *Dave Forhnmayer*, Attorney General of Oregon; and *David L. Wilkinson*, Attorney General of Utah.

Briefs of *amici curiae* urging affirmance were filed by *George Deukmejian*, Attorney General, and *Neal J. Gobar*, Deputy Attorney General, for the State of California; and by *Edward C. Rustigan* for Continental Illinois Bank & Trust Company of Chicago et al.

Briefs of *amici curiae* were filed by *Marlow W. Cook, Lee H. Spence,* and *Robert L. Ash* for Allied Lyons p.l.c. et al.; by *Francis D. Morrissey* and *Peter B. Powles* for the Canadian Imperial Bank of Commerce et al.; by *Joanne M. Garvey* and *Roy E. Crawford* for the Committee on Unitary Tax; by *William H. Allen, John B. Jones, Jr.*, and *Mark I. Levy* for the Financial Executives Institute; by *Norman B. Barker* and *John L. Endicott* for Gulf Oil Corp.; by *Anthon S. Cannon, Jr.*, for the International Bankers Association in California et al.; by *John Dwight Evans, Jr.*, for Mobil Oil Corp.; by *Norman B. Barker* and *Dean C. Dunlavey* for Sony Corp. et al.; and by *Joseph H. Guttentag, Carolyn E. Agger*, and *Daniel M. Lewis* for Union of Industries of the European Community.

This case was restored to the calendar for reargument, 456 U. S. 958, but was not reargued.]

cated and cases remanded for further consideration in light of *Shaw* v. *Delta Air Lines, Inc.*, *ante*, p. 85. Reported below: 385 Mass. 598, 433 N. E. 2d 1223.

Certiorari Granted—Reversed and Remanded. (See No. 82–947, *ante*, p. 1112; and No. 82–1666, *ante*, p. 1121.)

Certiorari Granted—Vacated and Remanded

No. 81–1672. PENNZOIL CO. *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Public Service Comm'n of New York* v. *Mid-Louisiana Gas Co.*, *ante*, p. 319.

No. 81–1916. CALIFORNIA *v.* RIEGLER. Ct. App. Cal., 5th App. Dist. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Illinois* v. *Andreas*, *ante*, p. 765. Reported below: 127 Cal. App. 3d 317, 179 Cal. Rptr. 530.

No. 82–151. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL NO. 710 PENSION FUND, ET AL. *v.* JANOWSKI ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983). Reported below: 673 F. 2d 931.

No. 82–262. CALIFORNIA ET AL. *v.* RETIRED PUBLIC EMPLOYEES' ASSOCIATION OF CALIFORNIA, CHAPTER 22, ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, *ante*, p. 1073. Reported below: 677 F. 2d 733.

No. 82–722. LEDBETTER ET AL. *v.* BENHAM ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Jones* v. *United States*, *ante*, p. 354. Reported below: 678 F. 2d 511.

No. 82-791. TEACHERS INSURANCE & ANNUITY ASSN. ET AL. *v.* SPIRT ET AL.; and

No. 82-913. LONG ISLAND UNIVERSITY *v.* SPIRT ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris, ante,* p. 1073. Reported below: 691 F. 2d 1054.

No. 82-794. PETERS ET AL. *v.* WAYNE STATE UNIVERSITY ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris, ante,* p. 1073. Reported below: 691 F. 2d 235.

No. 82-840. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS *v.* HENRY. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Barclay* v. *Florida, ante,* p. 939. JUSTICE BRENNAN and JUSTICE MARSHALL would deny certiorari. Reported below: 686 F. 2d 311.

No. 82-6263. SAWYER *v.* LOUISIANA. Sup. Ct. La. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Zant* v. *Stephens,* 462 U. S. 862 (1983). Reported below: 422 So. 2d 95.

No. 82-6370. MARRERO *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Solem* v. *Helm, ante,* p. 277. Reported below: 690 F. 2d 906.

Miscellaneous Orders

No. A-1035. REGAN, SECRETARY OF THE TREASURY, ET AL. *v.* WALD ET AL. Application to stay the mandate of the United States Court of Appeals for the First Circuit, presented to JUSTICE BRENNAN, and by him referred to the

Court, is granted pending the timely filing and disposition of a petition for writ of certiorari. JUSTICE BRENNAN and JUSTICE STEVENS would deny the application.

No. D–317. IN RE DISBARMENT OF MACK. Disbarment entered. [For earlier order herein, see 460 U. S. 1008.]

No. D–324. IN RE DISBARMENT OF JAVITZ. Disbarment entered. [For earlier order herein, see 460 U. S. 1019.]

No. 80–1640. UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. *v.* SHOLLY ET AL.; and

No. 80–1656. METROPOLITAN EDISON CO. ET AL. *v.* PEOPLE AGAINST NUCLEAR ENERGY ET AL., 461 U. S. 912. Motion of respondents for reconsideration of the Court's order denying their motion to retax costs denied.

JUSTICE BLACKMUN, dissenting.

In order to facilitate maintenance and cleaning following the 1979 accident at a nuclear reactor at Three Mile Island, petitioner Nuclear Regulatory Commission approved an amendment to the reactor's operating license authorizing the venting of accumulated radioactive gas. Respondents, several individuals who reside near Three Mile Island and an organization opposed to nuclear power, filed an action in the United States Court of Appeals for the District of Columbia Circuit challenging the Commission's determination that it could approve the amendment without a hearing.

Before the Court of Appeals acted on the case, the venting process was completed. The court eventually held that the case was not moot because the situation was capable of repetition yet evading review. On the merits, the court agreed with respondents that the Commission lacked authority under § 189 of the Atomic Energy Act, 42 U. S. C. § 2239, to dispense with a hearing before amending a license. 209 U. S. App. D. C. 59, 651 F. 2d 780 (1980) *(per curiam)*. The Commission then proposed to Congress legislation that would authorize similar license amendments without a hearing.

We granted certiorari, 451 U. S. 1016 (1981), and twice postponed oral argument while Congress considered the proposed legislation. 454 U. S. 1050 (1981); 458 U. S. 1128 (1982).

In January of this year, Congress enacted legislation amending the relevant portion of § 189. Act of Jan. 4, 1983, § 12(a), 96 Stat. 2073. Petitioners then suggested that this Court vacate and remand the case to the Court of Appeals with directions to dismiss it as moot. On February 22, we adopted an alternative disposition proposed by respondents, vacating the judgment and remanding for consideration of the issue of mootness and for further consideration in light of the new law. 459 U. S. 1194.

Costs were assessed against respondents in the amount of $2,226 pursuant to this Court's Rule 50.2, which provides: "In a case of reversal or vacating of any judgment or decree by this Court, costs shall be allowed to appellant or petitioner, unless otherwise ordered by the Court." Respondents moved to retax costs, asserting that under the circumstances it would be unfair to burden them with petitioners' costs as well as their own. The Court, over the dissent of two Justices, denied the motion on May 2, 1983, 461 U. S. 912, and respondents now seek reconsideration of that decision.

In again denying respondents' motion to retax costs, the Court fails to exercise the sound discretion contemplated by Rule 50.2. The rationale of Rule 50.2 is that a petitioner who prevails in this Court should be reimbursed for his costs. In essence, the Rule presumes that the petitioner prevails when the lower court's judgment is vacated or reversed, but enables the Court to alter the operation of that presumption when fairness so dictates. The Court has exercised this authority in prior cases, *e. g.*, *Commissioner* v. *Standard Life & Accident Ins. Co.*, 434 U. S. 900 (1977); *Wood* v. *Strickland*, 421 U. S. 997 (1975). In my view, it is even more appropriate in this case to depart from the usual operation of the Rule and to order that each party bear its own costs.

In vacating the Court of Appeals' judgment, this Court expressed no view of the merits. The only judicial decision addressing the propriety of the Commission's actions under the preamendment version of § 189 is that of the Court of Appeals, which resolved the issue in respondents' favor. This Court's judgment in no way suggests that petitioners would have triumphed under the prior statutory scheme; it simply reflects petitioners' success in shifting their energies from the judicial to the legislative arena. Petitioners, in short, lost in the Court of Appeals, persuaded this Court to review that court's decision at substantial cost to all the parties, and, after obtaining an amendment of the relevant statutory provision, sought unsuccessfully to have this Court order the Court of Appeals to vacate its judgment as moot. Yet respondents, who were victorious in the Court of Appeals, and suggested the disposition adopted by the Court in this case following the enactment of the new legislation, now must pay petitioners' costs.

Because this result is unnecessary under the Court's Rules and patently unfair under the circumstances of this case, I dissent. I would grant respondents' motion, and allow no costs to either party.

No. 81-1687. SONY CORPORATION OF AMERICA ET AL. *v.* UNIVERSAL CITY STUDIOS, INC., ET AL. C. A. 9th Cir. [Certiorari granted, 457 U. S. 1116]; and

No. 81-2101. PENNHURST STATE SCHOOL AND HOSPITAL ET AL. *v.* HALDERMAN ET AL. C. A. 3d Cir. [Certiorari granted, 457 U. S. 1131.] Cases restored to calendar for reargument.

No. 82-185. BOSTON FIREFIGHTERS UNION, LOCAL 718 *v.* BOSTON CHAPTER, NAACP, ET AL.;

No. 82-246. BOSTON POLICE PATROLMEN'S ASSN., INC. *v.* CASTRO ET AL.; and

No. 82-259. BEECHER ET AL. *v.* BOSTON CHAPTER, NAACP, ET AL., 461 U. S. 477. Motion of respondents to retax costs denied. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

JUSTICE BLACKMUN, dissenting.

In 1981, the city of Boston decided to lay off hundreds of firefighters and police officers. By statute, Massachusetts requires that civil service layoffs occur in the order of reverse seniority. Mass. Gen. Laws Ann., ch. 31, § 39 (West 1979). Many minority members of Boston's Police and Fire Departments had been hired only recently pursuant to consent decrees by which Boston agreed to increase the proportion of minorities in the Departments in order to remedy its past discriminatory hiring practices. As a result, layoffs under the statutory last-hired, first-fired policy would have reduced significantly the minority representation in the two Departments.

Respondents obtained an order from the United States District Court for the District of Massachusetts enjoining Boston from laying off personnel pursuant to the statutory policy to the extent that such layoffs would reduce the percentage of minority police officers and firefighters below the level obtained before the layoffs began. The United States Court of Appeals for the First Circuit affirmed. 679 F. 2d 965 (1982). After the Court of Appeals' decision, Massachusetts enacted legislation providing Boston with new revenues, requiring it to reinstate all police officers and firefighters laid off during the city's fiscal crisis, and securing those persons against future layoffs for fiscal reasons. 1982 Mass. Acts, ch. 190, § 25.

This Court granted certiorari to consider this important affirmative-action issue. 459 U. S. 967 (1982). After hearing oral argument, however, the Court vacated the judgment and remanded for consideration of mootness in light of the new Massachusetts legislation. 461 U. S. 477 (1983). Costs were assessed against respondents under this Court's Rule 50.2, which provides: "In a case of reversal or vacating of any judgment or decree by this Court, costs shall be allowed to appellant or petitioner, unless otherwise ordered by the Court." Respondents have moved to retax costs.

Here, as in *United States Nuclear Regulatory Comm'n* v. *Sholly*, *ante*, p. 1224 (BLACKMUN, J., dissenting from denial of motion), I believe the Court errs in denying respondents' motion. The Court's disposition of this case, which petitioners actively opposed, accorded petitioners none of the relief they sought, and in no way questioned the propriety, at the time it was rendered, of the Court of Appeals' judgment. Under these circumstances, I simply do not understand why respondents must pay petitioners' costs. As in *Sholly*, I would grant respondents' motion, and allow no costs to either party.

Certiorari Granted

No. 81–2149. SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY *v.* STUMES. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 3 presented by the petition. Reported below: 671 F. 2d 1150.

Certiorari Denied. (See also Nos. 82–177 and 82–209, *supra.*)

No. 81–432. CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK ET AL. *v.* GUARDIANS ASSN. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 232.

No. 81–1332. ROBERTS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 123 Cal. App. 3d 684, 177 Cal. Rptr. 11.

No. 81–1747. UNITED STATES *v.* DUNCAN ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 229 Ct. Cl. 120, 667 F. 2d 36.

No. 81–2334. WHITE MOUNTAIN APACHE TRIBE *v.* SMITH, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 219 U. S. App. D. C. 116, 675 F. 2d 1341.

No. 81-6021. WALLS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 81-6787. BLAKNEY *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 197 Mont. 131, 641 P. 2d 1045.

No. 81-6807. SKINNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 667 F. 2d 1306.

No. 82-201. READING HOSPITAL & MEDICAL CENTER *v.* CHOWDHURY. C. A. 3d Cir. Certiorari denied. Reported below: 677 F. 2d 317.

No. 82-698. HOWARD ET AL. *v.* TAYLOR ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 686 F. 2d 1346.

No. 82-896. ACQUIN *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 187 Conn. 647, 448 A. 2d 163.

No. 82-5916. HARDEN *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 639 S. W. 2d 90.

No. 81-2240. ALABAMA ET AL. *v.* MYLAR, AKA MILES. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 671 F. 2d 1299.

No. 81-5044. MONROE *v.* LOUISIANA. Sup. Ct. La.;
No. 81-5698. SONNIER *v.* LOUISIANA. Sup. Ct. La.;
No. 81-5971. WHITE *v.* FLORIDA. Sup. Ct. Fla.;
No. 81-6454. MATTHESON *v.* LOUISIANA. Sup. Ct. La.;
No. 82-5935. JACKSON *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS OF FLORIDA. Sup. Ct. Fla.;
No. 82-6110. RAULERSON *v.* FLORIDA. Sup. Ct. Fla.;
No. 82-6425. WOOMER *v.* SOUTH CAROLINA. Sup. Ct. S. C.; and

No. 82-6663. MIDDLETON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 81-5044, 397 So. 2d 1258; No. 81-5698, 402 So. 2d 650; No. 81-5971, 403 So. 2d 331; No. 81-6454, 407 So. 2d 1150; No. 82-5935, 421 So. 2d 1385; No. 82-6110, 420 So. 2d 567; No. 82-6425, 278 S. C. 468, 299 S. E. 2d 317; No. 82-6663, 426 So. 2d 548.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 82-1. MINNESOTA *v.* BROWN. Sup. Ct. Minn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 317 N. W. 2d 714.

No. 82-1312. UTAH POWER & LIGHT CO. ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.;

No. 82-1345. ALABAMA POWER CO. ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.; and

No. 82-1346. PACIFIC GAS & ELECTRIC CO. ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 11th Cir. Motion of Sacramento Municipal Utility District et al. for leave to file a brief as *amici curiae* granted. Motion of Utah Public Service Commission in No. 82-1312 for leave to file a brief as *amicus curiae* granted. Motions of American Farm Bureau Federation et al. and Public Utilities Commission of California in No. 82-1346 for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. JUSTICE POWELL took no part in the consideration or decision of these motions and these petitions. Reported below: 685 F. 2d 1311.

No. 82-6645. MERRELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 53.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Between May 11, 1979, and April 19, 1980, the Federal Bureau of Investigation maintained surveillance of certain premises in Detroit that were suspected of being the site of an illegal gambling operation. The surveillance, which entailed videotaping and recording activities and conversations, revealed an illegal dice game. As a result, 13 people were charged with violation of 18 U. S. C. § 1955* and conspiracy under 18 U. S. C. § 371. Eight codefendants, the lessor of the premises, the game operator, three dealers, and three watchmen, pleaded guilty after three days of trial. The remaining five codefendants waived a jury for the rest of the trial. Four of them were acquitted of all charges because they were "mere bettors." The evidence presented by the Government concerning petitioner established that he regularly served coffee to bettors during the gambling sessions; after the sessions he stacked tables and chairs, swept the floor, cleaned ashtrays, and repositioned the tables and chairs. Petitioner was convicted of the substantive offense of conducting an illegal gambling business, but acquitted of conspiracy.

On appeal, petitioner claimed that his activities did not justify his conviction. The Court of Appeals held that the proper standard to employ in resolving petitioner's claim is whether he performed "any act, duty or function which is necessary or *helpful* in operating the enterprise." 701 F. 2d 53, 55 (1983). That holding conflicts with the decision in *United States* v. *Boss*, 671 F. 2d 396, 400 (CA10 1982), where it was held that the proper standard is whether the person performs "a function . . . necessary to the illegal gambling business." That court interpreted the term "conduct" to require "some actual involvement in the gambling operation," *ibid.*, and found that neither a waitress, a bartender, nor a band member could be considered "conductors" under § 1955, *id.*, at 402.

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*Title 18 U. S. C. § 1955 provides, in pertinent part:

"Prohibition of illegal gambling businesses

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section—

"(1) 'illegal gambling business' means a gambling business which—

"(i) is a violation of the law of a State or political subdivision in which it is conducted;

"(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

"(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day."

There is a significant difference between activities that are "necessary" to the operation of an illegal gambling establishment and those that are only "helpful." The *Boss* case involved the question whether waitresses who served drinks to the bettors in the illegal gambling establishment as well as to customers in the adjacent dance hall were "conductors" within the meaning of § 1955. The Tenth Circuit found they were not because their functions were not necessary, but merely helpful. I do not find that case distinguishable from the present one. The difference between conviction and acquittal should not rest on whether an illegal gambling establishment existed in isolation or was concealed within another, legal, establishment. If a waitress who functions solely as a waitress in an illegal gambling establishment could not be convicted under § 1955, as the Tenth Circuit has held, then a waiter/janitor who functions solely as a waiter/janitor should not be convicted either.

Because a case involving a conflict among the courts of appeals concerning the standard to be applied in determining criminal liability involves either the unjust conviction of an innocent person or the frustration of congressional intent to criminalize specific conduct, it necessarily presents an important question. Certiorari should be granted, and the case should be set for argument. I dissent.

JULY 8, 1983

Dismissal Under Rule 53

No. 82–1859. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. ET AL. *v.* OGILVIE, AS TRUSTEE OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO., ET AL. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 701 F. 2d 604.

AUGUST 3, 1983

Dismissals Under Rule 53

No. 82–1147. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (AFL–CIO) ET AL. *v.* NATIONAL CONSTRUCTORS ASSN. ET AL. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 678 F. 2d 492.

No. 82–5934. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53.

AUGUST 5, 1983

Miscellaneous Order

No. A–66 (81–5698). SONNIER *v.* LOUISIANA, *ante*, p. 1229. Application for suspension of the order of the Court denying the petition for writ of certiorari pending the disposition of the petition for rehearing, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the application. THE CHIEF JUSTICE and JUSTICE O'CONNOR took no part in the consideration or decision of this application.

AUGUST 8, 1983

Dismissal Under Rule 53

No. 83–10. PRESSROOM UNIONS-PRINTERS LEAGUE INCOME SECURITY FUND *v.* CONTINENTAL ASSURANCE CO. ET AL. C. A. 2d Cir. Certiorari dismissed as to respondents

Reserve Life Insurance Co. and American Progressive Life & Health Insurance Company of New York under this Court's Rule 53. Reported below: 700 F. 2d 889.

AUGUST 16, 1983

Dismissal Under Rule 53

No. 82–1146. NATIONAL ELECTRICAL CONTRACTORS ASSN., INC., ET AL. *v.* NATIONAL CONSTRUCTORS ASSN. ET AL. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 678 F. 2d 492.

AUGUST 17, 1983

Dismissal Under Rule 53

No. 82–1143. MILLER ELECTRIC CO. ET AL. *v.* NATIONAL CONSTRUCTORS ASSN. ET AL. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 678 F. 2d 492.

AUGUST 23, 1983

Miscellaneous Orders

No. A–16. HANLON *v.* UNITED STATES. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. 82–485. KEETON *v.* HUSTLER MAGAZINE, INC., ET AL. C. A. 1st Cir. [Certiorari granted, 459 U. S. 1169.] Motions of Motor Vehicle Manufacturers Association of America, Inc., CBS Inc. et al., and Association of American Publishers, Inc., for leave to file briefs as *amici curiae* granted.

No. 82–500. SOUTHLAND CORP. ET AL. *v.* KEATING ET AL. Sup. Ct. Cal. [Probable jurisdiction postponed, 459 U. S. 1101.] Motion of Securities Division of the State of Washington et al. for leave to file a brief as *amici curiae* granted.

No. 82–792. GROVE CITY COLLEGE ET AL. *v.* BELL, SECRETARY OF EDUCATION, ET AL. C. A. 3d Cir. [Certiorari granted, 459 U. S. 1199.] Motion of American Association of University Women et al. for leave to file out-of-time motion for leave to participate in oral argument as *amici curiae* denied.

No. 82–898. MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES *v.* KNIGHT ET AL.; and

No. 82–977. MINNESOTA COMMUNITY COLLEGE FACULTY ASSN. ET AL. *v.* KNIGHT ET AL. D. C. Minn. [Probable jurisdiction noted, 460 U. S. 1050.] Motion of American Association of University Professors for leave to file a brief as *amicus curiae* granted.

No. 82–1246. BOSE CORP. *v.* CONSUMERS UNION OF UNITED STATES, INC. C. A. 1st Cir. [Certiorari granted, 461 U. S. 904.] Motions of American Civil Liberties Union et al. and The New York Times Co. et al. for leave to file briefs as *amici curiae* granted.

No. 82–1256. LYNCH, MAYOR OF PAWTUCKET, ET AL. *v.* DONNELLY ET AL. C. A. 1st Cir. [Certiorari granted, 460 U. S. 1080.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 82–1401. CALDER ET AL. *v.* JONES ET AL. Ct. App. Cal., 2d App. Dist. [Probable jurisdiction postponed, 460 U. S. 1080.] Motion of Authors League of America, Inc., for leave to file a brief as *amicus curiae* granted.

No. 82–1432. PULLIAM, MAGISTRATE FOR THE COUNTY OF CULPEPER, VIRGINIA *v.* ALLEN ET AL. C. A. 4th Cir. [Certiorari granted, 461 U. S. 904.] Motion of Judge Abraham J. Gafni for leave to participate in oral argument as *amicus curiae* denied.

Rehearing Denied

No. 81-2162. PIONEER FINISHING CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL., 460 U. S. 1080;

No. 82-834. WALCK *v.* AMERICAN STOCK EXCHANGE, INC., ET AL., 461 U. S. 942;

No. 82-1395. DRURY *v.* UNITED STATES, 461 U. S. 943;

No. 82-1408. MAGGIO, WARDEN *v.* FULFORD, 462 U. S. 111;

No. 82-1496. CARDWELL ET AL. *v.* TAYLOR, 461 U. S. 571;

No. 82-1562. TIMMONS *v.* ZONING BOARD OF ADJUSTMENT ET AL., 461 U. S. 929;

No. 82-1612. AHMED *v.* ENVIRONMENTAL PROTECTION AGENCY, 461 U. S. 930;

No. 82-1686. KALARIS, ADMINISTRATIVE APPEALS JUDGE, ET AL. *v.* DONOVAN, SECRETARY OF LABOR, ET AL., 462 U. S. 1119;

No. 82-1834. SCALISE ET AL. *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL., 462 U. S. 1121;

No. 82-5527. RIOS *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, 461 U. S. 958;

No. 82-5840. MILLER *v.* ILLINOIS, 461 U. S. 961;

No. 82-6281. ZARRILLI *v.* RANDALL ET AL., 460 U. S. 1090;

No. 82-6466. RUIZ *v.* ILLINOIS, 462 U. S. 1112;

No. 82-6514. ZETTLEMOYER *v.* PENNSYLVANIA, 461 U. S. 970;

No. 82-6521. ROTHWELL *v.* BAILEY ET AL., 461 U. S. 946;

No. 82-6534. DUVALLON *v.* FLORIDA, 462 U. S. 1109;

No. 82-6556. GRETZLER *v.* ARIZONA, 461 U. S. 971;

No. 82-6565. MASTERS *v.* OHIO, 461 U. S. 960;

No. 82-6567. JOHNSON *v.* UNITED STATES, 462 U. S. 1121;

No. 82-6590. RITTER *v.* RITTER, 462 U. S. 1121; and

No. 82-6689. SPELLMAN *v.* RIDLEY, ADMINISTRATOR, LORTON YOUTH CENTER, 462 U. S. 1110. Petitions for rehearing denied.

No. 81-430. ILLINOIS *v.* GATES ET UX., 462 U. S. 213. Petition for rehearing and correction of judgment denied.

No. 81-2095. CLANCY ET AL. *v.* JARTECH, INC., ET AL., 459 U. S. 879 and 1059; and

No. 82-345. COOPER, CITY ATTORNEY OF SANTA ANA, CALIFORNIA *v.* MITCHELL BROTHERS' SANTA ANA THEATER ET AL., 459 U. S. 944 and 1093. Motions for leave to file second petitions for rehearing and all other relief denied.

No. 82-714. SEATH *v.* REGULATIONS AND PERMITS ADMINISTRATION ET AL., 459 U. S. 1146. Motion for leave to file petition for rehearing denied.

No. 82-6662. IN RE KAGELER ET AL., 462 U. S. 1117. Petition for rehearing and all other relief denied.

SEPTEMBER 1, 1983

Certiorari Denied

No. 83-5290 (A-134). GRAY *v.* LUCAS, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Application for stay of execution, scheduled for 12:01 a.m. on September 2, 1983, addressed to JUSTICE BRENNAN and referred to the Court, denied. JUSTICE STEVENS would grant the application for stay. Reported below: 710 F. 2d 1048.

THE CHIEF JUSTICE, concurring.

On August 23, 1983, the applicant, Jimmy Lee Gray, filed a third petition for certiorari and an application for a stay of execution addressed to JUSTICE WHITE. JUSTICE WHITE denied petitioner's application for a stay on August 25, 1983, and the following day, the Mississippi Supreme Court set petitioner's execution for September 2, 1983. Now before the Court is petitioner's petition for certiorari and his reapplication for a stay of execution addressed to JUSTICE BRENNAN, and referred to the Court.

The facts and procedural history have not been referred to in the dissent. Since they are critical, they are set forth as follows: (1) In October 1976, petitioner was indicted for capital murder. At trial, the State proved that on June 25, 1976, petitioner abducted a 3-year-old girl, carried her to a remote area, and after sexually molesting her, suffocated her in a muddy ditch and threw her body into a stream. Petitioner was convicted and sentenced to death. (2) On appeal, the Mississippi Supreme Court reversed the conviction and remanded the case for a new trial. *Gray* v. *State*, 351 So. 2d 1342 (1977). (3) On retrial in 1978, Gray was again convicted of capital murder and sentenced to death. (4) The Mississippi Supreme Court affirmed both the conviction and the death sentence. *Gray* v. *State*, 375 So. 2d 994 (1979). (5) We denied petitioner's petitions for certiorari and rehearing. *Gray* v. *Mississippi*, 446 U. S. 988, rehearing denied, 448 U. S. 912 (1980).

(6) Petitioner filed his first applications for a writ of error *coram nobis* and stay of execution before the Mississippi Supreme Court in July 1980. (7) After the state court's summary denial of the writ, petitioner filed a petition for a writ of habeas corpus in the Federal District Court for the Southern District of Mississippi. The court conducted an evidentiary hearing with respect to several of Gray's 22 claims of constitutional violation and denied relief. (8) The Court of Appeals for the Fifth Circuit affirmed and denied petitioner's motion for rehearing. *Gray* v. *Lucas*, 677 F. 2d 1086, rehearing denied, 685 F. 2d 139 (1982). (9) A petition for certiorari and rehearing were once again denied by this Court. 461 U. S. 910 (1983); 462 U. S. 1124 (1983). On May 11, 1983, the Mississippi Supreme Court set the execution date for July 6, 1983.

(10) On June 22, 1983 petitioner submitted to the Mississippi Supreme Court a second motion for stay of execution along with a new application for a writ of error *coram nobis.* The petition raised, among others, those claims now before this Court. The Mississippi Supreme Court denied all re-

quested relief on June 29, 1983. (11) Petitioner thereupon filed his second petition for a writ of habeas corpus in the Federal District Court, reasserting those claims he had submitted to the Mississippi Supreme Court. (12) On July 2, 1983, the Court of Appeals granted petitioner's application for a stay of execution. (13) The District Court dismissed the petition for habeas corpus on July 8, 1983. (14) The Court of Appeals affirmed, *Gray* v. *Lucas*, 710 F. 2d 1048 (1983), and denied petitioner's petition for rehearing. The stay was dissolved on August 26, 1983.

This case has been in state and federal courts for seven years. It has been tried twice in the state court and reviewed by the Mississippi Supreme Court four times. Seventeen different federal judges have reviewed petitioner's case, and this Court has previously acted on this case four times prior to JUSTICE WHITE's denial of petitioner's application for a stay last week. Over the past seven years, judicial action reviewing this case has been taken 82 times by 26 different state and federal judges.

Petitioner's latest claims have been reviewed by several courts in both the state and federal systems. Petitioner's principal claim, which JUSTICE MARSHALL addresses in his dissent, is that the lethal gas method of execution constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. In my view, no evidentiary hearing on the effects of lethal gas is required. A number of affidavits describing such effects were filed with and considered by the Court of Appeals, and the contents of several of these have been set forth in the dissent today of JUSTICE MARSHALL. For purposes of my vote in this case, I accept the truth of the affidavits submitted by the petitioner, but nevertheless conclude—as did the Court of Appeals—that they do not as a matter of law establish an Eighth Amendment violation. I agree with the Court of Appeals that the showing made by petitioner does not justify a court holding that, "as a matter of law or fact, the pain and terror resulting from death by cyanide is so different in degree or nature from that resulting from other traditional modes of execution as to implicate the eighth amendment right." *Gray* v. *Lucas*, 710 F. 2d, at 1061.

This case illustrates a recent pattern of calculated efforts to frustrate valid judgments after painstaking judicial review over a number of years; at some point there must be finality. I join the Court's action denying the petition for certiorari and denying a stay of execution.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

In this application for a stay, petitioner asks simply that we postpone his execution long enough to allow us to consider and dispose of his pending petition for certiorari in which he challenges the decision of the United States Court of Appeals for the Fifth Circuit affirming the denial of his request for a writ of habeas corpus. *Gray* v. *Lucas*, 710 F. 2d 1048 (1983). I would grant the application.[1]

Petitioner argues that the method by which the State of Mississippi plans to execute him—exposure to cyanide gas—constitutes cruel and unusual punishment. In support of that claim, he submitted to the United States District Court for the Southern District of Mississippi numerous affidavits that described in graphic and horrifying detail the manner in which death is induced through this procedure.[2] *Gray* v.

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[1] Even if his petition for certiorari did not present the substantial constitutional claim discussed below, I would nevertheless grant petitioner's application for a stay, grant certiorari, and vacate petitioner's death sentence in accordance with my view that the death penalty is unconstitutional in all circumstances. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting).

[2] The District Court never assessed the relevance of these affidavits because it disposed of the claim on procedural grounds. The court determined that petitioner had neglected to present this Eighth Amendment

Lucas, No. S83–0546(C) (July 8, 1983). For example, Dr. Richard Traystman, Director of the Anesthesiology and Critical Care Medicine Research Laboratories at Johns Hopkins Medical School, described the process as follows:

> "'Very simply, cyanide gas blocks the utilization of the oxygen in the body's cells. * * * Gradually, depending on the rate and volume of inspiration, and on the concentration of the cyanide that is inhaled, the person exposed to cyanide gas will become anoxic. This is a condition defined by no oxygen. Death will follow through asphyxiation, when the heart and brain cease to receive oxygen.
>
> "'The hypoxic state can continue for several minutes after the cyanide gas is released in the execution chamber. The person exposed to this gas remains conscious for a period of time, in some cases for several minutes, again depending on the rate and volume of the gas that is inhaled. During this time, the person is unquestionably experiencing pain and extreme anxiety. The pain begins immediately, and is felt in the arms, shoulders, back, and chest. The sensation is similar to the pain felt by a person during a heart attack, where essentially, the heart is being deprived of oxygen. The severity of the pain varies directly with the diminishing oxygen reaching the tissues.
>
> "'The agitation and anxiety a person experiences in the hypoxic state will stimulate the autonomic nervous system. . . . [The person] . . . may begin to drool, urinate, defecate, or vomit. There will be a muscular con-

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claim in state-court proceedings and therefore had forfeited his right to raise the issue in federal court. *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). The District Court also reasoned that, since petitioner's original counsel did not include this claim in a previous federal habeas corpus petition, petitioner had waived the claim, and it would be an abuse of the writ for him to try to raise it in his current habeas petition. See *Sanders* v. *United States*, 373 U. S. 1, 17–19 (1963); 28 U. S. C. § 2254 Rule 9(b).

> tractio[n]. These responses can occur both while the person is conscious, or when he becomes unconscious.
>
> "'When the anoxia sets in, the brain remains alive for from two to five minutes. The heart will continue to beat for a period of time after that, perhaps five to seven minutes, or longer, though at a very low cardiac output. Death can occur ten to twelve minutes after the gas is released in the chamber.'" *Gray* v. *Lucas*, 710 F. 2d, at 1060.

Dr. Traystman further testifed that the lethal-gas method is sufficiently painful that it is disfavored in the scientific community as a way of putting animals to sleep. "'We would not use asphyxiation, by cyanide gas or by any other substance, in our laboratory to kill animals that have been used in experiments—nor would most medical research laboratories in this country use it.'" *Ibid.*

Other affiants described in less clinical language the effects of the procedure when used to execute people:

> "'When the cyanide gas reached [the prisoner], he gasped, and convulsed strenuously. He stiffened. His head lurched back. His eyes widened, and he strained as much as the straps that held him to the chair would allow. He unquestionably appeared to be in pain.
>
> "'Periodically now, perhaps at thirty second intervals, he would convulse, alternately straining and relaxing in the chair. I noticed he had urinated. The convulsions continued for approximately ten more minutes, and you could see his chest expand, and then contract, trying to take in fresh air. These movements became weaker as the minutes ticked away. You could not tell when [he] finally lost consciousness.
>
> "'According to prison officials, [he] died . . . approximately 12 minutes after the cyanide pellets had dropped in the chamber. Death was pronounced after the shade

> on our observation window had been drawn, though there was still some slight movement in the body.
>
> . . . . .
>
> "'The pellets of cyanide were released by mechanical controls, and dropped into an acid jar beneath the chair. The gas rose, and seemed to hit him immediately. Within the first minute [he] slumped down. I thought to myself how quickly cyanide really worked.
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> "'Within 30 seconds he lifted his head upwards again. He raised his entire body, arching, tugging at his straps. Saliva was oozing from his mouth. His eyes open, he turned his head to the right. He gazed through my window. His fingers were tightly gripping his thumbs. His chest was visibly heaving in sickening agony. Then he tilted his head higher, and rolled his eyes upward. Then he slumped forward. Still his heart was beating. It continued for another several minutes.
>
> "'He was pronounced dead, twelve minutes after the pellets were released, by the doctor who could hear his heart through the stethoscope, die.'" *Id.*, at 1058–1059.

The Court of Appeals accepted[3] petitioner's "proffered facts as proven." *Id.*, at 1061. Specifically, the court adopted petitioner's description of the method of execution as that of "death by cyanide gas, causing asphyxiation at the cost of protracted pain over a period that may exceed seven minutes." *Ibid.* The court refused, nevertheless, to reverse the District Court's decision denying petitioner an evidentiary hearing, reasoning that, "under present jurisprudential standards," petitioner's allegations were insufficient "to implicate the eighth amendment right." *Ibid.*

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[3] The Court of Appeals did not share the District Court's view that federal court review of this claim was procedurally barred. See n. 2, *supra*. The Circuit rejected the District Court's finding of forfeiture and ruled that, in reaching petitioner's claim on the merits, "the Mississippi Supreme Court itself removed any procedural bar which might otherwise impede a federal court's hearing on the merits." 710 F. 2d, at 1052, n. 2. The Circuit did not explicitly consider the District Court's "abuse of writ" ground for dismissal, but by electing to reach the merits of the claim, the court implicitly held that petitioner had offered adequate explanation of why the issue had not been raised in his first habeas corpus petition. In his brief to the Court of Appeals, petitioner explained that his original counsel had been unaware of the excruciating side effects of execution by lethal gas and that the current trend against the use of lethal gas was not yet evident

In my view, if the lethal-gas method operates in the manner described by petitioner, the Court of Appeals clearly erred in ruling that the method is not "cruel" under "present jurisprudential standards." The Eighth Amendment proscribes "punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'" *Estelle* v. *Gamble*, 429 U. S. 97, 102 (1976) (quoting *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958)). Identification of those standards is sometimes difficult, but two principles have long been beyond dispute. First, "[p]unishments are cruel when they involve torture or a lingering death." *In re Kemmler*, 136 U. S. 436, 447 (1890). Second, punishments are cruel when they "involve the unnecessary and wanton infliction of pain." *Gregg* v. *Georgia*, 428 U. S. 153, 173 (1976). A corollary of the second principle is that "no court would approve any method of implementation of the

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when petitioner filed his first federal habeas corpus petition. See *infra*, at 1246, and nn. 6 and 7. Alternatively, the Court of Appeals may quite correctly have concluded that, given the equitable nature of habeas relief, the District Court should not have denied petitioner an opportunity to challenge the means by which he will die simply because his attorney neglected to append the claim to an earlier petition. See *Fay* v. *Noia*, 372 U. S. 391, 438–440 (1963); *Sanders* v. *United States*, 373 U. S., at 17–18.

Relying on this Court's recent opinion in *Barefoot* v. *Estelle*, *ante*, p. 880, respondents suggest that second and successive habeas corpus petitions in death penalty cases should receive heightened scrutiny. I disagree. The majority in *Barefoot* explicitly endorsed the *Sanders* standard for reviewing second and successive petitions in death penalty cases. *Ante*, at 895. Since petitioner established that his failure to bring this claim in his previous petition was not an abuse of the writ under *Sanders*, the courts below were obliged to consider the claim on the merits.

death sentence found to involve unnecessary cruelty in light of presently available alternatives." *Furman* v. *Georgia*, 408 U. S. 238, 430 (1972) (POWELL, J., joined by BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., dissenting); see also *id.*, at 279 (BRENNAN, J., concurring).

The Court of Appeals failed to apply either of the foregoing principles to the case before it. Instead, the court attempted to assess the "pain and terror" associated with "traditional modes of execution" (such as hanging) and concluded that the difference between the trauma associated with the use of lethal gas and the trauma associated with those traditional methods was not so great as to render the former constitutionally infirm. *Gray* v. *Lucas*, 710 F. 2d., at 1061. Had the court made an effort to apply the proper legal standards, it seems highly likely that it would have found the lethal-gas method to be unconstitutional. A death that, as the court recognized, involves extreme pain over a span of 10 to 12 minutes surely must be characterized as "lingering," see *In re Kemmler*, *supra*. And petitioner directed the court's attention to at least one readily available alternative method of administering the death penalty that, though equally barbaric in its effects, involves far less physical pain than the use of cyanide gas;[4] it seems indisputable, therefore, that the lethal-gas method is "unnecessarily cruel."

That execution through the administration of lethal gas violates the Eighth Amendment is confirmed by examination of the treatment accorded the method in recent years by the state legislatures. This Court has often indicated that assessment of the constitutional status of a given punishment "'should be informed by objective factors to the maximum possible extent.'" *Enmund* v. *Florida*, 458 U. S. 782, 788 (1982) (quoting *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion)). Among the most important of those factors is the direction in which contemporary "legislative judgments" are moving. *Enmund* v. *Florida*, *supra*. Between 1921 and 1973, several States by statute adopted the lethal-gas method. In most instances, the abandonment of the scaffold or electric chair in favor of the gas chamber was prompted by humanitarian motives; asphyxiation was regarded as a less painful and more dignified way of administering the death penalty than hanging or electrocution.[5] However, as awareness of the trauma associated with the lethal-gas method grew and as the lethal-injection method became better known, the trend was reversed. In the past decade, no State has adopted the lethal-gas method. By contrast, three States that formerly employed the gas chamber exclusively have altered their laws to require or permit use of the injection procedure.[6] At least two other States that never had used the gas chamber considered adopting the method but rejected it in favor of the injection system.[7] At present, only 7 of the 39 jurisdictions that retain the death penalty require use of the gas chamber.[8] This evolving consensus against compulsory use of the lethal-gas method buttresses the conclusion that the procedure must now be considered "cruel."

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[4] That method is the lethal-injection procedure, which involves intravenous injection of a fast-acting barbituate combined with a paralytic agent. See Royal Commission on Capital Punishment, 1949-1953 Report, Cmd. No. 8932, p. 257 (1980); Gardner, Executions and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment, 39 Ohio St. L. J. 96, 128-129 (1978).

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[5] See L. Berkson, The Concept of Cruel and Unusual Punishment 29–31 (1975).

[6] See 1983 Nev. Stats., ch. 601, § 1 (amending Nev. Rev. Stat. § 176.355 (1979)); N. M. Stat. Ann. § 31–14–11 (Supp. 1983); 1983 N. C. Sess. Laws, ch. 678 (amending N. C. Gen. Stat. § 15–187 (1978)).

[7] See 1977 Okla. Sess. Law, ch. 41, § 1; 1977 Tex. Gen. Laws, ch. 138, § 1.

[8] The seven States are Arizona (Ariz. Rev. Stat. Ann. § 13–704 (Supp. 1982–1983)); California (Cal. Penal Code Ann. § 3604 (West 1982)); Colorado (Colo. Rev. Stat. § 16–11–401 (1978)); Maryland (Md. Ann. Code, Art. 27, § 71 (1982)); Mississippi (Miss. Code Ann. § 99–19–51 (1972)); Missouri (Mo. Rev. Stat. § 546.720 (1978)); and Wyoming (Wyo. Stat. § 7–13–904 (1977)).

A similar situation was presented in *Enmund* v. *Florida*, 458 U. S. 782 (1982). In that case, the Court relied significantly upon the fact that "only a small minority of jurisdictions—eight—allow the death penalty to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed" in holding unconstitutional the use of capital punishment under such circumstances. *Id.*, at 792.

Under these circumstances, the majority's decision to deny the stay, thereby authorizing the execution of petitioner before we can even consider his petition for certiorari, seems to me unconscionable. Petitioner has presented a substantial challenge to the constitutionality of Mississippi's method of execution. The Court of Appeals has denied petitioner a hearing to develop his claim. *Townsend* v. *Sain*, 372 U. S. 293 (1963). Yet a majority of this Court declines to delay petitioner's execution a few more weeks until we can consider through our traditional means of deliberation whether this case raises issues of sufficient import to grant a writ of certiorari.

I dissent from the denial of the stay.

SEPTEMBER 6, 1983

Dismissal Under Rule 53

No. 82–2164. AUSTIN *v.* UNARCO INDUSTRIES, INC., ET AL. C. A. 1st Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 705 F. 2d 1.

SEPTEMBER 8, 1983

Miscellaneous Orders

No. A–57. BURLINGTON NORTHERN RAILROAD CO. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Application for stay, presented to JUSTICE WHITE, and by him referred to the Court, denied.

No. 82–432. LOCAL NO. 82, FURNITURE & PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN & PACKERS, ET AL. *v.* CROWLEY ET AL. C. A. 1st Cir. [Certiorari granted, 459 U. S. 1168.] Motion of Association for Union Democracy for leave to file a brief as *amicus curiae* granted.

No. 82–629. THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION *v.* WOLD ENGINEERING, P.C., ET AL. Sup. Ct. N. D. [Certiorari granted, 461 U. S. 904.] Motions of Standing Rock Sioux Tribe of North and South Dakota et al. and Turtle Mountain Band of Chippewa Indians for leave to file briefs as *amici curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 82–708. SUMMA CORP. *v.* CALIFORNIA EX REL. STATE LANDS COMMISSION ET AL. Sup. Ct. Cal. [Certiorari granted, 460 U. S. 1036.] Motion of Amigos de Bolsa Chica for leave to file a brief as *amicus curiae* granted.

No. 82–945. SURE-TAN, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. [Certiorari granted, 460 U. S. 1021.] Motions of California Agricultural Labor Relations Board and United Farm Workers of America, AFL–CIO, for leave to file briefs as *amici curiae* granted.

No. 82–1071. ALUMINUM COMPANY OF AMERICA ET AL. *v.* CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT ET AL. C. A. 9th Cir. [Certiorari granted, 460 U. S. 1050.] Motion of the Solicitor General for divided argument granted.

No. 82–1095. PULLEY, WARDEN *v.* HARRIS. C. A. 9th Cir. [Certiorari granted, 460 U. S. 1036.] Motion of National Council on Crime and Delinquency for leave to file a brief as *amicus curiae* granted.

No. 82–1326. WATT, SECRETARY OF THE INTERIOR, ET AL. *v.* CALIFORNIA ET AL.;

No. 82–1327. WESTERN OIL & GAS ASSN. ET AL. *v.* CALIFORNIA ET AL.; and

No. 82–1511. CALIFORNIA ET AL. *v.* WATT, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. [Certiorari granted, 461 U. S. 925.] Motion of Western Oil & Gas

Association et al. for divided argument granted. Request for additional time for oral argument denied. Motion of Humboldt County et al. for divided argument granted. Request for additional time for oral argument denied.

Rehearing Denied

No. 81–5044. MONROE *v.* LOUISIANA, *ante*, p. 1229;

No. 81–5240. GATES *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, *ante*, p. 1213;

No. 81–5698. SONNIER *v.* LOUISIANA, *ante*, p. 1229;

No. 81–5947. WATERS *v.* GEORGIA, *ante*, p. 1213;

No. 81–5962. TAYLOR *v.* NORTH CAROLINA, *ante*, p. 1213;

No. 81–6454. MATTHESON *v.* LOUISIANA, *ante*, p. 1229;

No. 82–698. HOWARD ET AL. *v.* TAYLOR ET AL., *ante*, p. 1229;

No. 82–1080. SIMON ET AL. *v.* DAVIS, SECRETARY OF COMMONWEALTH OF PENNSYLVANIA, ET AL., *ante*, p. 1219;

No. 82–1679. ALBERDING *v.* DONOVAN, SECRETARY OF LABOR, *ante*, p. 1207;

No. 82–1804. MUELLER *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE (CALIFORNIA, REAL PARTY IN INTEREST), *ante*, p. 1208;

No. 82–1902. DOLENZ *v.* ALL SAINTS EPISCOPAL HOSPITAL, 462 U. S. 1134;

No. 82–5128. MATHIS *v.* GEORGIA, *ante*, p. 1214;

No. 82–5260. MOORE *v.* LOUISIANA, *ante*, p. 1214;

No. 82–5868. WILLIAMS *v.* MAGGIO, WARDEN, ET AL., *ante*, p. 1214;

No. 82–6110. RAULERSON *v.* FLORIDA, *ante*, p. 1229;

No. 82–6192. ROBERTS *v.* SOUTH CAROLINA, *ante*, p. 1214;

No. 82–6618. BOTHWELL *v.* GEORGIA, *ante*, p. 1210;

No. 82–6640. IN RE DAMIANO, 462 U. S. 1130; and

No. 82–6705. BETKA *v.* SMITH ET AL., 462 U. S. 1125.

Petitions for rehearing denied.

No. 81–1717. AMERICAN BANK & TRUST CO. ET AL. *v.* DALLAS COUNTY ET AL.; BANK OF TEXAS ET AL. *v.* CHILDS ET AL.; and WYNNEWOOD BANK & TRUST ET AL. *v.* CHILDS ET AL., *ante*, p. 855. Petition of Dallas County et al. for rehearing denied. Petition of City of Dallas et al. for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions.

No. 81–2008. PROCESS GAS CONSUMERS GROUP ET AL. *v.* CONSUMER ENERGY COUNCIL OF AMERICA ET AL., *ante*, p. 1216. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

SEPTEMBER 12, 1983

Dismissal Under Rule 53

No. 82–1916. EMPRESA ECUATORIANA DE AVIACION, S. A. *v.* DISTRICT LODGE NO. 100, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, ET AL. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 690 F. 2d 838.

SEPTEMBER 21, 1983

Dismissal Under Rule 53

No. 83–270. MOORE *v.* MOORE. Ct. App. Okla. Certiorari dismissed under this Court's Rule 53.

SEPTEMBER 22, 1983

Dismissal Under Rule 53

No. 82–5935. JACKSON *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS OF FLORIDA, *ante*, p. 1229. Petition for rehearing dismissed under this Court's Rule 53.

SEPTEMBER 27, 1983

Dismissal Under Rule 53

No. 83–5419. STACY *v.* WAINWRIGHT. Dist. Ct. App. Fla., 1st Dist. Certiorari dismissed under this Court's Rule 53. Reported below: 434 So. 2d 893.

Miscellaneous Orders

No. 81-2101. PENNHURST STATE SCHOOL AND HOSPITAL ET AL. *v.* HALDERMAN ET AL. C. A. 3d Cir. [Certiorari granted, 457 U. S. 1131.] Motion of respondents to dismiss the writ of certiorari as improvidently granted is denied.

No. A-188 (83-5432). BALDWIN *v.* MAGGIO, WARDEN, LOUISIANA STATE PENITENTIARY, ET AL. C. A. 5th Cir. Application for stay of execution of the sentence of death scheduled for October 6, 1983, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending this Court's final action on the petition for writ of certiorari.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1251 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

WILLIAMS *v.* MISSOURI

ON APPLICATION FOR STAY

No. A–1077. Decided July 6, 1983

An application for a stay of execution pending timely filing and disposition of a petition for certiorari is granted, where the execution is set for a date before expiration of the period for applicant's filing a petition for certiorari to review the Missouri Supreme Court's affirmance of his conviction and death sentence.

JUSTICE BLACKMUN, Circuit Justice.

On May 31, 1983, the Supreme Court of Missouri affirmed applicant Williams' conviction and death sentence. 652 S. W. 2d 102. It noted applicant's execution was set for July 15. On June 30, the Missouri Supreme Court denied applicant's timely motion for rehearing, and his motion requesting that court to stay issuance of its mandate pending final disposition of a petition for certiorari in this Court. Under the Rules of this Court, applicant has until August 29, 1983, to file a petition for certiorari. He has applied to me for a stay of execution pending timely filing and disposition of that petition. The application is granted.

"[D]irect appeal is the primary avenue for review of a conviction or sentence." *Barefoot* v. *Estelle*, *ante*, at 887. If a federal question is involved, the process of direct review "includes the right to petition this Court for a writ of certiorari." *Ibid.* A stay of execution obviously is essential to realization of this right if the execution otherwise would occur prior to the expiration of a defendant's time to petition this Court for direct review. The defendant must have at least one opportunity to present to the full Court his claims that his death sentence has been imposed unconstitutionally. For this reason, if a State schedules an execution to take place before filing and disposition of a petition for certiorari, I must stay that execution pending completion of direct review, as a matter of course.

CAPITAL CITIES MEDIA, INC., ET AL. v. TOOLE, JUDGE OF THE COURT OF COMMON PLEAS OF LUZERNE COUNTY

ON APPLICATION FOR STAY

No. A-1070. Decided July 13, 1983

An application to stay respondent Pennsylvania trial court judge's order is granted insofar as it prohibits publication of the names or addresses of jurors who served in a homicide trial. The order, which was entered after the jurors had been selected in open *voir dire* proceedings at which their names were not kept confidential, is not restricted to the time during which the trial was conducted, but on its face permanently prohibits publishing the jurors' names or addresses. The jury ultimately returned a guilty verdict and was discharged. If the Pennsylvania Supreme Court, which denied an application for summary relief, were to sustain the order on its merits, four Justices of this Court would probably vote to grant review, and there would be a substantial prospect of reversal. However, the application is denied insofar as it seeks a stay of the order's prohibition of the sketching, photographing, televising, or videotaping of any of the jurors "during their service in these proceedings." Since the jury has been discharged, this provision of the order can no longer have effect, and there is no prospect of immediate injury to applicants before they can seek appellate review of the order. The application is also denied without prejudice to its renewal insofar as it seeks a stay of another order of the trial judge restricting access to exhibits, since applicants have neither identified the exhibits to which they seek access nor indicated that they have sought an order from the trial judge permitting them access.

JUSTICE BRENNAN, Circuit Justice.

This is an application for an immediate stay of several orders entered by the Court of Common Pleas of Luzerne County, Pa., in connection with a homicide trial in that court, *Commonwealth* v. *Banks*, Criminal Cases Nos. 1290, 1506, 1507, 1508, 1519, 1520, 1524 of 1982, that had attracted a great deal of public interest. The specific orders in question were entered by respondent Judge Toole on June 3, 1983, after selection of the trial jury but before its sequestration.

In one order, respondent directed first that "[n]o person shall print or announce in any way the names or addresses of any juror," Order in Accordance with Pa. Rule Crim. Proc. 1111(c), June 3, 1983, ¶2 (hereinafter ¶2), and also that "[n]o person shall draw sketches, photographs, televise or videotape any juror or jurors during their service in these proceedings . . . ," ¶6 (hereinafter ¶6). In a separate order, Judge Toole ordered that "[n]o one, except attorneys of record, their agents, court personnel, witnesses and jurors may handle exhibits except by Order of Court," Order Pursuant to Pa. Rule Crim. Proc. 326, June 3, 1983, ¶11 (hereinafter ¶11). The application for a stay was first presented to me on June 18, 1983, but I held it pending action by the Supreme Court of Pennsylvania on a substantially identical application for summary relief. On June 21, the jury returned a guilty verdict in the *Banks* case and was discharged; on June 30, the Supreme Court of Pennsylvania denied summary relief. Applicants immediately reapplied to me for a stay. An initial response was received by telegram on July 7, with a more complete response submitted on July 13.

In recent years, several Justices have had occasion to explain the role of a Circuit Justice in precisely this context, when a trial court has enjoined the press and other media from publication of information in connection with a criminal trial. Caution is the refrain of any Justice acting as Circuit Justice, but we have recognized the special importance of swift action to guard against the threat to First Amendment values posed by prior restraints. It is clear that even a short-lived "gag" order in a case of widespread concern to the community constitutes a substantial prior restraint and causes irreparable injury to First Amendment interests as long as it remains in effect. When it appears that there is a significant possibility that this Court would grant plenary review and reverse the lower court's decision, at least in part, a stay may issue. *Nebraska Press Assn.* v. *Stuart*, 423 U. S. 1327, 1330 (1975) (BLACKMUN, Circuit Justice); *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U. S.

1301, 1305 (1974) (POWELL, Circuit Justice). See also *Bonura* v. *CBS, Inc.*, 459 U. S. 1313 (1983) (WHITE, Circuit Justice).

I address first the ¶2 provision, which on its face permanently restrains publication of the names or addresses of any juror. Counsel for respondent has informed the Clerk of this Court that this order remains in effect, and that publication at this time of the name of a juror would subject the publisher to the possibility of being held in contempt of court. This order was entered by the court *sua sponte* and without a hearing or a record; neither the prosecution nor defendant has expressed any interest in it. Cf. *Gannett Co.* v. *DePasquale*, 443 U. S. 368 (1979). The jury was selected at *voir dire* proceedings begun prior to the issuance of this order, from which the press and public were not excluded, and at which the names of the prospective jurors were not kept confidential. Cf. *Press-Enterprise Co.* v. *Superior Court of California*, 4 Civil No. 27904 (Ct. App. Cal., 4th App. Dist., May 13, 1982), cert. granted, 459 U. S. 1169 (1983).

It hardly requires repetition that "'[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity,'" and that the State "'carries a heavy burden of showing justification for the imposition of such a restraint.'" *New York Times Co.* v. *United States*, 403 U. S. 713, 714 (1971) *(per curiam)*. This Court has given plenary consideration to a number of state statutes and court orders issued thereunder restraining publication of information in connection with a criminal trial or restricting press access to a criminal trial for the purpose of preventing such publication. Just last Term, in *Globe Newspaper Co.* v. *Superior Court*, 457 U. S. 596 (1982), we held that the First and Fourteenth Amendments prohibited enforcement of a rule barring press and public access to criminal sex-offense trials during the testimony of minor victims. We adopted a familiar standard: "Where, as in the present case, the State attempts . . . to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id.*, at 606–607; cf. *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97 (1979).

I assume, for purposes of argument only, that the State has a compelling interest in keeping personal information about jurors confidential in an appropriate case, either to assure the defendant a fair trial or to protect the privacy of jurors. Cf. *Globe Newspaper*, *supra*, at 607; *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 600 (1980) (Stewart, J., concurring in judgment). Our precedents make clear, however, that far more justification than appears on this record would be necessary to show that this categorical, permanent prohibition against publishing information already in the public record was "narrowly tailored to serve that interest," if indeed any justification would suffice to sustain a permanent order. Based on these precedents, I must conclude that if the Supreme Court of Pennsylvania sustained this order on its merits, four Justices of this Court would vote to grant review, and there would be a substantial prospect of reversal.

Insofar as the State's interest is in shielding jurors from pressure during the course of the trial, so as to ensure the defendant a fair trial, that interest becomes attenuated after the jury brings in its verdict and is discharged. Cf. *Gannett Co.* v. *DePasquale*, *supra*, at 400 (POWELL, J., concurring). As for the State's concern for the jurors' privacy, we have not permitted restrictions on the publication of information that would have been available to any member of the public who attended an open proceeding in a criminal trial, *Oklahoma Publishing Co.* v. *District Court*, 430 U. S. 308, 311–312 (1977) *(per curiam)*; *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 568 (1976), even for the obviously sympathetic purpose of protecting the privacy of rape victims, *Globe Newspaper*, *supra*, at 607–609; *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 491–495 (1975). See also *Smith* v.

Daily Mail Publishing Co., *supra*, at 104: "If the information is lawfully obtained . . . the state may not punish its publication except when necessary to further an interest more substantial than is present here"—*i. e.*, protecting the privacy of an 11-year-old boy charged with a juvenile offense. In an extraordinary case such a restriction might be justified, but the justifications must be adduced on a case-by-case basis, with all interested parties given the opportunity to participate, and less restrictive alternatives must be adopted if feasible. *Globe Newspaper*, *supra*, at 608–609, and n. 25; *Richmond Newspapers, Inc.* v. *Virginia*, *supra*, at 580–581 (opinion of BURGER, C. J.); *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829, 842–843 (1978). The ¶2 order was entered without a hearing, and without findings of fact that would justify it; respondent has suggested no concern specific to this case in support of his order. Accordingly, I grant applicants' request for a stay of the ¶2 provision.

It would be inappropriate for me to grant a stay of the ¶6 or ¶11 provisions. By its terms, the ¶6 provision applied only "during [the jurors'] service in these proceedings." Since the jury has been discharged, this particular provision can no longer have effect. It may be that such an order, although it had expired, could still receive appellate review in this Court under the "capable of repetition, yet evading review" doctrine, see *Nebraska Press Assn.*, 427 U. S., at 546–547, but there is no prospect of immediate injury to applicants before they can seek review of the order, so their application for a stay must be denied. As for the ¶11 provision, restricting access to exhibits, applicants have neither identified the exhibits to which they seek access, nor have they indicated that they have sought a court order permitting them access. The application for a stay of the ¶11 provision is denied without prejudice to its renewal in the event a request for access to exhibits is denied by the trial judge.

I shall issue an order accordingly.

JULIAN *v.* UNITED STATES

ON APPLICATION FOR BAIL

No. A–1071. Decided July 13, 1983

An application for bail pending disposition of applicant's petition for certiorari to review the Court of Appeals' judgment—which affirmed his conviction and sentences for attempted importation of narcotics, making false statements to a Government official, in violation of 18 U. S. C. § 1001, and failing to file a report in connection with the transportation of more than $5,000 outside the United States, in violation of 31 U. S. C. § 1101—is denied. None of the contentions raised by applicant, including issues relating to statutory construction and double jeopardy principles, is likely to command the vote of four Justices to grant certiorari.

JUSTICE REHNQUIST, Circuit Justice.

Applicant has filed a motion for bail pending disposition of his petition for writ of certiorari. He was arrested in Los Angeles on May 7, 1980, while attempting to board a nonstop flight to Lima, Peru. Prior to the scheduled departure time, a customs official had announced that anyone taking more than $5,000 currency out of the country was required to file a report with the Customs Service. When stopped on the boarding ramp, applicant acknowledged that he had heard the announcement but denied that he was carrying more than $5,000. He repeated this denial during subsequent questioning, but a search of his person and belongings revealed approximately $29,000 in cash as well as a variety of narcotics paraphernalia.

Following a jury trial in the United States District Court for the Central District of California, applicant was convicted of attempted importation of narcotics; making false statements to a Government official, in violation of 18 U. S. C. § 1001; and failing to file a report in connection with the transportation of more than $5,000 outside the United States, in violation of 84 Stat. 1122, 31 U. S. C. § 1101. He was sentenced to concurrent 5-year terms and fined $5,000 each on the first two counts. He received a consecutive 1-year term and a $5,000 fine on the third count.

Applicant was freed on bond pending appeal. The Court of Appeals, by a divided vote, affirmed his conviction in all respects, and this application followed. For the reasons explained below, the application is denied.

The standards to be applied are well established. Applications for bail to this Court are granted only in extraordinary circumstances, especially where, as here, "the lower court refused to stay its order pending appeal." *Graves* v. *Barnes*, 405 U. S. 1201, 1203 (1972) (POWELL, J., in chambers). At a minimum, a bail applicant must demonstrate a reasonable probability that four Justices are likely to vote to grant certiorari. *Bateman* v. *Arizona*, 429 U. S. 1302, 1305 (1976) (REHNQUIST, J., in chambers).

Applicant raises a number of contentions in his petition, none of which, I believe, is likely to command the vote of four Justices. First, he argues that 18 U. S. C. § 1001 does not apply to his statements at all because those statements were oral, unsworn, exculpatory, and immaterial. A fair reading of the statute, however, brings applicant's false statements to the customs official squarely within the prohibition of § 1001.* Second, applicant contends that a conviction under both 18 U. S. C. § 1001 and 31 U. S. C. § 1101 violates the Double Jeopardy Clause. But under the principle of statutory construction established in *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932), cumulative punishments under separate statutes are permitted provided only that each statute requires proof of a fact not required by the other. Title 18 U. S. C. § 1001 requires a finding that applicant misled a Government official by material false statements. Title 31 U. S. C. § 1101 requires a different finding that applicant failed to file the required currency reporting form. Thus, the *Blockburger* test is satisfied, and *a fortiori* there is no double jeopardy.

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*Title 18 U. S. C. §1001 provides in relevant part:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Applicant also claims that the evidence taken from his person and his luggage was the fruit of unconstitutional searches and should have been suppressed. But see *United States* v. *Ramsey*, 431 U. S. 606, 616–619 (1977) (border searches require neither probable cause nor a warrant). Applicant's remaining contentions are even less substantial.

For these reasons, the application is

Denied.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION *v.* BOARD OF REGENTS OF UNIVERSITY OF OKLAHOMA ET AL.

ON APPLICATION FOR STAY

No. A–24. Decided July 21, 1983

An application by the National Collegiate Athletic Association, whose membership includes many colleges, universities, and athletic conferences, to stay the judgments of the Court of Appeals and the District Court is granted, pending the timely filing and disposition of a petition for a writ of certiorari. The courts below, in an action brought by respondents against applicant, held that the antitrust laws were violated by applicant's plan involving contracts with certain television networks for the broadcasting of football games of applicant's members, and an injunction has been issued forbidding further implementation of the contracts. A stay is proper since it is likely that at least four Justices will vote to grant certiorari, there is a sufficient prospect that applicant will ultimately prevail, and the equities pending decision on the merits favor applicant.

JUSTICE WHITE, Circuit Justice.

The application for a stay is granted, and the temporary stay of the judgments of the Court of Appeals and the District Court is continued pending the timely filing and disposition of a petition for writ of certiorari in the above-entitled action. If the petition is denied, this stay will terminate automatically. If certiorari is granted, the stay will continue in effect, pending judgment on the merits or other disposition of the case. Briefly stated, the reasons for granting the stay are as follows.

The National Collegiate Athletic Association is a private, nonprofit association of some 900 4-year colleges and universities meeting certain academic standards and of athletic conferences, associations, and other groups interested in intercollegiate athletics. Of these, some 800 are voting members, about 500 field football teams, and 187 are so-called Division I schools. These latter schools, the District Court found, dominate college football television.

The NCAA regulates many aspects of intercollegiate athletics, including the televising of intercollegiate football games, the arrangements for which it has controlled since 1953. The current plan involves contracts with two networks, CBS and ABC, covering the 1982–1985 seasons, as well as a 2-year contract with the Turner Broadcasting System. The District Court, in describing the contracts, stated that each network must broadcast a game on at least 14 different dates, and each must televise at least 35 games each year. At least seven broadcasts must be national and at least six regional. The networks select the games they will broadcast, at least 82 different teams must appear on each network over a 2-year period, and no school may appear more than six times during a 2-year period. Each network is obligated to pay a minimum of $131,750,000 over the four years; TBS will pay $17,696,000 over two years. From these sums, the NCAA takes a percentage, certain sums are reserved for participants in the Division II and III competitions, and the balance is divided equally among those schools who have appeared on the broadcasts covered by the contracts. Schools not selected to appear under the contract are not permitted to make their own arrangements to broadcast their games, and schools that do appear may not undertake to have additional games televised.

The Regents of the University of Oklahoma and the University of Georgia Athletic Association brought this action against the NCAA, asserting that the NCAA's regulatory scheme violates the antitrust laws. The District Court agreed, holding that the scheme constituted price fixing that was illegal *per se* under § 1 of the Sherman Act and the relevant cases; it also held that the arrangement was an illegal group boycott, was monopolization forbidden by § 2, and was in any event an unreasonable restraint of trade. 546 F. Supp. 1276 (WD Okla. 1982). The contracts were declared null and void, and an injunction was entered forbidding their further implementation.

The Court of Appeals for the Tenth Circuit, while disagreeing with the boycott and monopolization holdings, otherwise upheld the decision of the District Court. 707 F. 2d 1147 (1983). Although it ordered the judgment affirmed, it remanded with instructions that the District Court "consider its injunction in light of" the Court of Appeals' opinion. *Id.*, at 1162. The court's mandate has issued. The NCAA, asserting that it will petition for certiorari, has requested a stay; the respondents have opposed the stay, as has the United States as *amicus curiae*.

Having examined the papers so far filed with me and assuming that they fairly represent the issues and what has occurred in this case, I can say with confidence that I would vote to grant certiorari. Somewhat less confidently, I expect that at least three other Justices would likewise vote to grant. The judgment below would obviously have a major impact countrywide, and the case plainly presents important issues under the antitrust laws.

I also have little doubt that if certiorari is to be granted the equities pending decision on the merits are with the NCAA. The two respondent schools might do better for themselves during the 1983 season if they were free to go their own way, but were a stay to issue, their harm would be limited to the difference between what they would receive under the NCAA arrangements and what they could otherwise garner. On the other hand, unless the judgment is stayed, it would appear that the networks' contracts would be void under the outstanding judgment and could not be enforced; the entire 1983 season would be at risk not only for the NCAA but also for many, if not most, of the schools which it represents, including many schools that would prefer the NCAA arrangements to continue at least through the 1983 season.

Although the question is a close one, I am also of the view that there is a sufficient likelihood that the court below erred in one or more important respects to justify issuing the stay. For example, the *per se* price-fixing holding is questionable to my mind; also, although in the long run I may agree with the courts below in this respect, I have some doubt whether they reached the correct result under the Rule of Reason.

Accordingly, having determined that certiorari will likely be granted, that there is a sufficient prospect that the NCAA will ultimately prevail, and that the equities favor the NCAA, I conclude that a stay is in order.

Respondents suggest that the NCAA should be required to post bond if the stay is granted. I am not inclined to impose that requirement. I note that the Court of Appeals stayed the judgment of the District Court without bond while the case was on appeal to it. I see no need to change that procedure.

RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *v.* MONSANTO CO.

ON APPLICATION FOR STAY

No. A-1066. Decided July 27, 1983

An application to stay, pending appeal, an injunction of the District Court—which held unconstitutional, and enjoined enforcement of, provisions of the Federal Insecticide, Fungicide, and Rodenticide Act that authorize manufacturers seeking registration of pesticides with the Environmental Protection Agency (EPA) to use test data submitted by an earlier registration applicant, and that permit disclosure to the public of health and safety data—is denied. Applicant, the Administrator of the EPA, failed to show that irreparable harm to the EPA will result if the District Court's injunction remains in effect pending appeal. However, the granting of a stay might well cause irreparable harm to respondent, a manufacturer of registered pesticides who had submitted test data consisting of trade secrets entitled under state law to protection from disclosure and use by others. In addition, the Administrator has not been particularly expeditious in seeking a stay or in pressing his appeal.

JUSTICE BLACKMUN, Circuit Justice.

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U. S. C. §136 *et seq.* (1982 ed.), as amended in 1978, 92 Stat. 819, requires pesticide manufacturers to register their products with the Environmental Protection Agency (EPA) prior to marketing them in the United States. The EPA decides whether to register a pesticide; it bases its decision on an evaluation of test data concerning the product's effectiveness and potential dangers. These data typically are submitted by the pesticide's manufacturer. Section 3(c)(1)(D) of FIFRA, 7 U. S. C. §136a(c)(1)(D) (1982 ed.), provides, however, that test data submitted in connection with a particular pesticide may be used by manufacturers seeking registration of similar pesticides. In effect, a subsequent applicant for registration may "piggyback" its registration on the efforts of the initial applicant. The subsequent applicant must offer to compensate the initial applicant, and compensation is to be determined by binding arbitration if the parties cannot agree on a sum. § 3(c)(1)(D), 7 U. S. C. § 136a(c)(1)(D) (1982 ed.). In addition, health and safety data submitted by the initial applicant may be disclosed to the public pursuant to § 10(d), 7 U. S. C. § 136h(d) (1982 ed.).

Respondent Monsanto Company manufactures several registered pesticides. To obtain registration, Monsanto submitted test data developed at a cost claimed to be in excess of $23 million. These test data are trade secrets under the law of Missouri, and Monsanto consequently has the right to prevent their use and disclosure. Monsanto brought suit in the United States District Court for the Eastern District of Missouri, contending that the use or disclosure of its test data pursuant to the FIFRA provisions described above would constitute an unconstitutional taking of its property. The District Court agreed, and enjoined enforcement of these and related provisions of FIFRA. The District Court declined to stay its injunction pending direct appeal to this Court, and the Administrator of the EPA has applied to me for a stay. Having reviewed the application, the response, and the other memoranda and supporting documents filed by the parties and several *amici*, I deny the application.

A Justice of this Court will grant a stay pending appeal only under extraordinary circumstances, *Graves* v. *Barnes*, 405 U. S. 1201, 1203 (1972) (POWELL, J., in chambers), and a district court's conclusion that a stay is unwarranted is entitled to considerable deference. *Id.*, at 1203–1204; *Bateman* v. *Arizona*, 429 U. S. 1302, 1304 (1976) (REHNQUIST, J., in chambers). An applicant for a stay "must meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal." *Whalen* v. *Roe*, 423 U. S. 1313, 1316 (1975) (MARSHALL, J., in chambers); see *Graves* v. *Barnes*, 405

U. S., at 1203. An applicant's likelihood of success on the merits need not be considered, however, if the applicant fails to show irreparable injury from the denial of the stay. *Whalen* v. *Roe*, 423 U. S., at 1317–1318.

In this case, the Administrator has not convinced me that irreparable harm will result if the District Court's injunction remains in effect pending appeal. During this interim period, the injunction prevents the EPA from registering new pesticides through use of previously submitted test data, and members of the public will be unable to obtain test data relating to health and safety. The EPA will remain able, however, to register new pesticides; applicants for registration may submit their own test data to support their applications, and may rely on previously submitted data if the submitters have given permission. The EPA has adopted interim procedures to permit registration in this manner. See 48 Fed. Reg. 32012–32013 (1983). If an applicant for registration chooses to rely on previously submitted data without the submitter's permission, the EPA may process the application although it may not actually register the product pending appeal. While registrations and disclosures will be delayed somewhat, "delay alone is not, on these facts, irreparable injury." *Whalen* v. *Roe*, 423 U. S., at 1317.

Two other considerations enter into my decision to deny this application. First, the granting of a stay might well cause irreparable harm to Monsanto. If the District Court's injunction were lifted, the EPA would be free to use Monsanto's trade secrets for the benefit of its competitors and could disclose them to members of the public. Monsanto's trade secrets would become public knowledge, and could not be made secret again if the judgment below ultimately is affirmed. In addition, the Administrator has not been particularly expeditious in seeking a stay or in pressing his appeal. This application was filed more than seven weeks after the District Court issued its amended judgment. The Administrator has requested and received a 30-day extension of time in which to file his jurisdictional statement with this Court. While certainly not dispositive, the Administrator's failure to act with greater dispatch tends to blunt his claim of urgency and counsels against the grant of a stay. See *Beame* v. *Friends of the Earth*, 434 U. S. 1310, 1313 (1977) (MARSHALL, J., in chambers).

I shall enter an order accordingly.

BELLOTTI, ATTORNEY GENERAL, COMMONWEALTH OF MASSACHUSETTS *v.* LATINO POLITICAL ACTION COMMITTEE ET AL.

ON APPLICATION FOR STAY

No. A–99. Decided August 11, 1983

An application to stay, pending the filing and disposition of a petition for a writ of certiorari, the District Court's judgment—holding unconstitutional, and enjoining preliminary or final elections under, a new electoral districting plan for the election of members of the Boston City Council and the School Committee—is denied. It is not reasonably probable that four Justices will consider the issues involved to be sufficiently meritorious to grant certiorari; nor is there a fair prospect that a majority of the Court will conclude that the decision below was erroneous. The inconvenience and delay imposed by the District Court's requirement that the districting plan be revised before elections can go forward are not so great as to warrant a stay.

JUSTICE BRENNAN, Circuit Justice.

The Attorney General of the Commonwealth of Massachusetts has applied to me for a stay pending the filing and consideration by this Court of a petition for a writ of certiorari to review the judgment of the District Court for the District of Massachusetts entered on July 26, 1983. *Latino Political Action Committee* v. *City of Boston*, 568 F. Supp. 1012. That judgment found unconstitutional a new electoral districting plan adopted by the Boston City Council and approved by the Mayor of Boston for the election by district of members of the City Council and the School Committee, and enjoined the defendants from conducting preliminary or final elections under the provisions of the plan. On August 2, 1983, the District Court permitted the Attorney General to intervene in this matter and denied his motions to stay the court's judgment pending appeal and for relief from judgment. The Court of Appeals for the First Circuit, on August 5, 1983, also denied the Attorney General's request for a stay, 716 F. 2d 68, and this application followed.

The general principles that guide my consideration as a Circuit Justice of this application are well settled:

> "Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct. In a case like the present one, this can be accomplished only if a four-part showing is made. First, it must be established that there is a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. Second, the applicant must persuade [the Circuit Justice] that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. While related to the first inquiry, this question may involve somewhat different considerations, especially in cases presented on direct appeal. Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. And fourth, in a close case it may be appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Rostker* v. *Goldberg*, 448 U. S. 1306, 1308 (1980) (BRENNAN, J., in chambers) (citations omitted).

After carefully considering the opinions below and the submissions of the applicant and respondents, I have concluded that under the circumstances of this case it is not reasonably probable that four Justices will consider the issues presented by the applicant sufficiently meritorious to grant certiorari; nor is there, in my judgment, a fair prospect that a majority of the Court will conclude that the decision below was erroneous. With respect to the third *Rostker* consideration, I have concluded that the inconvenience and delay imposed by the District Court's requirement that the districting plan be revised before elections can go forward are not so great as to warrant a stay of the judgment of the District Court.

Accordingly, the application is denied.

KEMP, SUPERINTENDENT, COLUMBIA DIAGNOSTIC AND CLASSIFICATION CENTER *v.* SMITH

ON APPLICATION TO VACATE STAY

No. A–133. Decided August 24, 1983

An application to vacate the Court of Appeals' stay of respondent's execution is denied. The papers presented do not show that the Court of Appeals abused its discretion in granting a stay pending a hearing on the merits in respondent's habeas corpus proceedings.

JUSTICE POWELL, Circuit Justice.

Respondent Smith, a convicted murderer, is scheduled to be executed by the State of Georgia at 8 a. m. tomorrow, Thursday, August 25.

At about 4:25 p. m. on August 23, the Court of Appeals for the Eleventh Circuit—reversing the District Court—granted a stay of execution. Its brief opinion stated that substantial issues were raised in this habeas corpus proceeding that justified review of their merits. Judge Hill dissented. At about 10 a. m. today, the Attorney General of Georgia filed an application with me as Circuit Justice requesting that I dissolve and vacate this stay. A response to this application was received this afternoon in my chambers at about 3 o'clock.

This is the fourth time that this capital case has required action by this Court: once on direct appeal, once on state habeas corpus, once on federal habeas corpus, and now in Smith's second federal habeas proceeding. Apart from rehearings, this case has been reviewed 16 times by state and federal courts since Smith's conviction in 1975. In these circumstances, and for the reasons stated by Judge Hill in his dissenting opinion below, it is not clear to me that the Court of Appeals is correct in thinking that substantial issues may remain for further consideration.

But in the present posture of the case, the question before me as Circuit Justice is whether the Court of Appeals has abused its discretion in granting a temporary stay pending a hearing on the merits. I am not able so to conclude. It is apparent from the papers presented that the Court of Appeals heard arguments at some length yesterday afternoon. Moreover, and quite properly, that court has provided for an expeditious hearing on the merits.

Accordingly, the application to vacate the stay ordered by the Court of Appeals is denied.

HAWAII HOUSING AUTHORITY ET AL. *v.* MIDKIFF ET AL.

ON APPLICATION FOR STAY

No. A-113. Decided September 2, 1983

An application to stay an order of the Court of Appeals—which, after holding the condemnation provisions of the Hawaii Land Reform Act unconstitutional, later entered the challenged order that recalled its mandate for clarification and, pending such clarification, enjoined applicants, the Hawaii Housing Authority and its commissioners and executive director, from pursuing or initiating any state administrative or judicial proceedings under the Act—is denied. Although a notice of appeal to this Court was filed with the Court of Appeals before it issued the order, a court retains the power to grant injunctive relief to a party to preserve the status quo during the pendency of an appeal, and the record does not show that the Court of Appeals abused its power in recalling its mandate. While the order does not contain findings such as those contemplated by Federal Rule of Civil Procedure 65, a stay based on such ground would be inappropriate at the present time since the Court of Appeals contemplates possible modification of its injunction in the near future. And because of the unique interlocutory posture of the case at present, it would also be inappropriate to stay the order on the asserted ground that the injunction against further state proceedings violates principles of federalism; the order is not demonstrably wrong, and the Court of Appeals itself may revise its order shortly.

JUSTICE REHNQUIST, Circuit Justice.

Applicants,* the Hawaii Housing Authority, its commissioners and executive director, request that I stay or vacate an order of the United States Court of Appeals for the Ninth Circuit. The present application bears only tangentially on the merits of the underlying lawsuit, in which the Court of Appeals decided that the condemnation provisions of the Hawaii Land Reform Act, Haw. Rev. Stat. § 516-1 *et seq.* (1976 and Supp. 1982), violated the "Takings Clause" of the Fifth Amendment to the United States Constitution. *Mid-*

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*Applicants are supported by numerous lessee homeowner associations which intervened in the proceedings below.

kiff v. *Tom*, 702 F. 2d 788 (CA9 1983). Applicants have appealed to this Court from that ruling, and their jurisdictional statement will be considered by this Court in due course. This application arises out of the decision of the Court of Appeals on August 11, some four months after its opinion on the merits was issued, to recall its mandate for clarification and, pending such clarification, to enjoin applicants from pursuing or initiating any state administrative or judicial proceedings under the Hawaii Land Reform Act. For the reasons that follow, I will deny applicants' request.

Applicants base their request for a stay on three arguments. First, they argue that because a notice of appeal to this Court was filed with the Court of Appeals on July 18, 1983, the Court of Appeals lacked the power to recall and clarify its mandate on August 11, 1983. Jurisdiction over this case, they claim, had shifted to this Court. I find this reasoning unpersuasive. Whatever the current application of the so-called jurisdictional shift theory to modern appellate procedure, it is well settled that a court retains the power to grant injunctive relief to a party to preserve the status quo during the pendency of an appeal, even to this Court. See, *e. g.*, *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, 177 (1922); *Merrimack River Savings Bank* v. *Clay Center*, 219 U. S. 527, 531–535 (1911); Fed. Rule Civ. Proc. 62. Applicants also argue that respondents circumvented the normal appellate process when they sought recall of the mandate after the District Court had denied their request for injunctive relief. Although recalling a mandate is an extraordinary remedy, I think it probably lies within the inherent power of the Court of Appeals and is reviewable only for abuse of discretion. On the record before me, I am not prepared to say that the Court of Appeals abused its power in recalling its mandate.

Second, applicants contend that the traditional equitable requirements for an injunction were not shown to exist at the time the Court of Appeals issued its order in this case.

While the August 11th order of the Court of Appeals contained no findings such as those contemplated by Federal Rule of Civil Procedure 65, the Court of Appeals obviously contemplates possible modification of its injunction in the near future. At the present time, a stay based on this contention would be inappropriate.

Applicants' third contention raises by far the most serious question: whether the injunction issued by the Court of Appeals against further state proceedings violates the principles of federalism established in *Younger* v. *Harris*, 401 U. S. 37 (1971), *Huffman* v. *Pursue*, 420 U. S. 592 (1975), and later cases. The underlying rationale of *Younger* is a recognition that national government functions best if state institutions are unfettered in performing their separate functions in their separate ways. *Younger, supra,* at 44. A central part of this policy is a frank recognition that state courts, as judicial institutions of coextant sovereigns, are equally capable of safeguarding federal constitutional rights. See *Trainor* v. *Hernandez*, 431 U. S. 434, 446 (1977). Although originally adopted to prevent a federal court from enjoining pending state criminal proceedings, the principles of *Younger* are fully applicable to noncriminal proceedings when important state interests are involved. See *Middlesex County Ethics Committee* v. *Garden State Bar Assn.*, 457 U. S. 423 (1982); *Trainor, supra; Huffman, supra.* Where vital state interests are involved, a federal court should refrain from enjoining an ongoing state judicial proceeding unless state law clearly bars the interposition of constitutional claims, or some extraordinary circumstance exists requiring equitable relief. *Middlesex County Ethics Committee, supra,* at 432.

On the record before me, this third ground on which applicants' request for a stay is based seems to present a close and rather intricate question. There is no doubt in my mind that the *Younger-Huffman* rationale applies to a federal injunction against state judicial implementation of a far-reaching land reform program in which the State is itself a party to the proceedings in its own courts. I am totally unpersuaded by respondents' reliance on *Wooley* v. *Maynard*, 430 U. S. 705 (1977). In *Wooley*, the three state proceedings had already concluded, and the federal injunction had absolutely no effect on them. The same cannot be said of the effect of the Court of Appeals' injunction on the pending action in the courts of Hawaii.

A more doubtful question, both as to the law and the facts of this case, is the time as of which the determination should be made as to the pendency of state court proceedings. As I understand it, the injunction issued by the Court of Appeals in this case was the first such remedy that affected judicial proceedings. As of the date it was issued—August 11, 1983—there were indisputably significant condemnation cases pending in state court under the Land Reform Act. Certainly a strong argument can be made that this case may be analogized to *Hicks* v. *Miranda*, 422 U. S. 332 (1975), in that although the federal proceedings began before those brought by the State, no federal injunction of state condemnation proceedings was granted until the latter proceedings were underway. If, on the other hand, the critical date is the commencement of the proceeding in the United States District Court for the District of Hawaii in 1979, the question of whether state proceedings were pending might well be resolved differently. This application may also raise the issue left undecided in *Steffel* v. *Thompson*, 415 U. S. 452 (1974), as to the circumstances under which a properly issued federal judgment declaring a state law unconstitutional may be converted into an injunction against the enforcement of that law.

Even though these questions obviously cannot be finally resolved by a single Justice of this Court, were the Court of Appeals to continue its injunction in the present form after revising its mandate, or for an indefinite period of time, I would have to do the best I could to forecast how the full Court would resolve them. But the unique interlocutory posture of the case at present spares me that task. It would be an inappropriate exercise of my authority as Circuit Justice to stay an order of the Court of Appeals which is not demonstrably wrong and which that court itself may be disposed to revise in short order. The application is therefore denied without prejudice to its being renewed in the event of changed circumstances.

HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* LOPEZ ET AL.

ON APPLICATION FOR STAY

No. A-145. Decided September 9, 1983

An application by the Secretary of Health and Human Services—who had terminated social security disability benefits without first producing evidence that the recipient's medical condition had improved, contrary to earlier decisions of the Court of Appeals for the Ninth Circuit requiring such proof—to stay that portion of the District Court's preliminary injunction (in a class action challenging the constitutionality of the Secretary's action) requiring the Secretary to pay benefits to reapplying prior recipients until she establishes their lack of disability through hearings complying with the Ninth Circuit rule, is granted pending applicant's appeal to the Court of Appeals for the Ninth Circuit. In view of the scope of the injunction—involving issues relating to exhaustion of administrative remedies and judicial review of the Secretary's determinations of eligibility for benefits—four Justices would probably vote to grant certiorari should the Court of Appeals affirm the injunction.

JUSTICE REHNQUIST, Circuit Justice.

Applicant, the Secretary of Health and Human Services (Secretary), requests that I issue a partial stay pending appeal of a preliminary injunction issued by the District Court for the Central District of California. The Court of Appeals for the Ninth Circuit rejected the Secretary's application for an emergency stay and for a stay pending appeal. On September 1, 1983, I granted the Secretary's request for a temporary stay pending further consideration of the application and the response. I have now decided to grant the stay requested by the Secretary.

This class action was instituted by numerous individuals and organizations to challenge the Secretary's failure to follow two Ninth Circuit decisions in terminating the payment of benefits under Title II and Title XVI of the Social Security Act to recipients in the Ninth Circuit. On the authority of *Finnegan* v. *Matthews*, 641 F. 2d 1340 (CA9 1981), and *Patti* v. *Schweiker*, 669 F. 2d 582 (CA9 1982), respondents contend that the Secretary cannot terminate the payment of benefits without producing evidence that a recipient's medical condition has improved since he previously was declared disabled. The Secretary, on the other hand, relying on agency regulations which specifically disavow the holdings of *Patti* and *Finnegan*, contends that she can terminate benefits when current evidence indicates that a prior recipient is not now disabled. She argues that she need not produce specific evidence that the prior recipient's medical condition has improved.

Respondents styled their claim in the District Court as a constitutional challenge to the Secretary's "nonacquiescence" with settled law in the Ninth Circuit, an action which they argue violates constitutional principles of separation of powers and which deprives them of due process and equal protection. The District Court granted respondents' motion for class certification and their motion for a preliminary injunction.

The first part of the District Court's injunction, which the Secretary has not sought to stay, restrains the Secretary from disregarding *Patti* and *Finnegan* in pending and future cases. Paragraph 4(c), on the other hand, directs the Secretary within 60 days of the order to notify each member of the class that he can apply for reinstatement of benefits if he believes that his medical condition has not improved since his initial disability determination. Paragraph 4(c) requires the Secretary immediately to reinstate benefits to the applicants who apply. Following reinstatement of benefits, the Secretary can conduct hearings to establish lack of disability, but in those hearings, the Secretary must make a showing of medical improvement pursuant to *Patti* and *Finnegan* before terminating benefits. In a later order the District Court ruled that the Secretary can recoup interim benefits if she produces evidence at the hearing that the applicant's medical condition has improved now or that it had improved at the earlier time when benefits were terminated.

On August 15, 1983, after the Ninth Circuit refused to issue an emergency stay, the Secretary notified approximately 30,000 members of the class that they could apply for reinstatement of benefits. The Secretary already has begun to receive applications. Thus the Secretary only requests that I stay the portion of Paragraph 4(c) which requires her to pay benefits to all applicants until she establishes their lack of disability through hearings complying with *Patti* and *Finnegan*.

My obligation as a Circuit Justice in considering the usual stay application is "to determine whether four Justices would vote to grant certiorari, to balance the so-called 'stay equities,' and to give some consideration as to predicting the final outcome of the case in this Court." *Gregory-Portland Independent School District* v. *United States*, 448 U. S. 1342 (1980) (REHNQUIST, J., in chambers). The Secretary's stay application does not come to me in the posture of the usual application, however. The Secretary does not ask me to stay the judgment of the Court of Appeals pending the disposition of a petition for certiorari in this Court. She asks instead that I grant a stay of the District Court's judgment pending appeal to the Ninth Circuit when the Ninth Circuit itself has refused to issue the stay.

Although there is no question that I have jurisdiction to grant the Secretary's request, it is also clear that "'a stay application to a Circuit Justice on a matter before a court of appeals is rarely granted.'" *Atiyeh* v. *Capps*, 449 U. S. 1312, 1313 (1981) (REHNQUIST, J., in chambers) (citation omitted); see *O'Rourke* v. *Levine*, 80 S. Ct. 623, 624, 4 L. Ed. 2d 615, 616 (1960) (Harlan, J., in chambers). For the reasons I am about to set out, I believe that the present case is sufficiently unusual to warrant the relief sought.

Ordinarily, in an action for an injunction, the decision of the court on the "merits" will be of greater concern to a reviewing court than the particular provisions of an injunction, which are primarily entrusted to the discretion of the district court. In this case, however, I believe that the scope of the District Court's injunction would prompt review of the injunction by at least four Members of this Court should the Court of Appeals affirm it without modification. I believe this is true even though I assume that the Court of Appeals for the Ninth Circuit will certainly follow its *Patti* and *Finnegan* decisions when it hears the Secretary's appeal. I likewise assume that since there does not appear to be any significant circuit conflict on this point at present, four Justices of this Court would not be likely to grant a petition for certiorari should the Secretary seek review in this Court of the merits of a Ninth Circuit opinion reaffirming *Patti* and *Finnegan*.

But the District Court's injunction goes far beyond the application of *Patti* and *Finnegan* to concrete cases before it. I think that Paragraph 4(c) of the injunction issued by the District Court, because of its mandatory nature, its treatment of the statutory requirement of exhaustion of administrative remedies, and its direction to the Secretary to pay benefits on an interim basis to parties who have neither been found by the Secretary nor by a court of competent jurisdiction to be disabled, significantly interferes with the distribution between administrative and judicial responsibility for enforcement of the Social Security Act which Congress has established. While review of an injunction issued by a lower federal court independently of the "merits" of the issue involved in the case is not common, this Court has not hesitated to reverse a District Court where it concluded that the injunction did not comply with a provision of the Federal Rules of Civil Procedure, without ever reaching the "merits" of the question involved. See, *e. g.*, *Schmidt* v. *Lessard*, 414 U. S. 473 (1974).

The injunction issued by the District Court in this case must be evaluated first in the light of the provisions for judicial review of determinations of eligibility for benefits by the Secretary. The principal provisions follow:

> "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. . . . The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . . ." 49 Stat. 624, as amended, 42 U. S. C. § 405(g) (1976 ed., Supp. V).
>
> "The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under this subchapter." 42 U. S. C. § 405(h).

We have held that these provisions codify the doctrine of exhaustion of administrative remedies, circumscribe the methods by which judicial review of a determination of the Secretary may be obtained, and set forth the standard for the exercise of judicial review. *Weinberger* v. *Salfi*, 422 U. S. 749 (1975). We have also held that the scope of judicial review of the Secretary's determinations is a very limited one. *Heckler* v. *Campbell*, 461 U. S. 458, 466 (1983).

The scope of the District Court's injunction must also be evaluated in the light of familiar principles of administrative law enunciated in our decisions. In *Vermont Yankee Nu-*

clear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 524 (1978), this Court said:

> "[T]his Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments. In *FCC* v. *Schreiber*, 381 U. S. 279, 290 (1965), the Court explicated this principle, describing it as 'an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved.'"

In *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U. S. 326, 333 (1976), this Court similarly observed: "[I]n the absence of substantial justification for doing otherwise, a reviewing court may not after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency. Such a procedure clearly runs the risk of 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.' *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947)."

With these general principles in mind, I turn to the particulars of the injunction issued by the District Court. It is unlike the usual "prohibitory" injunction which merely freezes the positions of the parties until the court can hear the case on the merits. See *University of Texas* v. *Camenisch*, 451 U. S. 390, 395 (1981). The injunction issued here is in substance, if not in terms, a mandatory one, which "like a mandamus, is an extraordinary remedial process which is granted, not as a matter of right but in the exercise of a sound judicial discretion." *Morrison* v. *Work*, 266 U. S. 481, 490 (1925).

Paragraph 4(c) forces the Secretary immediately to pay benefits to every Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI) recipient whose benefits have been terminated within the last two years because of cessation of disability. It also forces the Secretary to pay benefits to every SSI recipient under the "Grandfather Clause" of the Social Security Act whose benefits have been terminated within the last three years because of cessation of disability. The Secretary's obligation to pay is triggered merely by the recipient's statement in his application that, in his subjective belief, his medical condition has not improved since the earlier determination. I have serious doubt, which I believe would be shared by other Members of this Court, whether this provision is consistent with 42 U. S. C. § 405(i) or with this Court's admonition in *Schweiker* v. *Hansen*, 450 U. S. 785 (1981), that the courts have a duty "'to observe the conditions defined by Congress for charging the public treasury.'" *Id.*, at 788 (quoting *Federal Crop Insurance Co.* v. *Merrill*, 332 U. S. 380, 385 (1947)).

The nature of the mandatory relief granted by the District Court in this case is exacerbated by the fact that the District Court defined the class to include numerous individuals who have never received "final decisions" from the Secretary on their claims within the meaning of 42 U. S. C. § 405(g) and over whom arguably the District Court has no jurisdiction. In *Weinberger* v. *Salfi*, *supra*, the Court held that there was a nonwaivable and a waivable portion of § 405(g)'s exhaustion requirement. The nonwaivable portion requires that "a claim for benefits shall have been presented to the Secretary" before judicial review can be sought. *Mathews* v. *Eldridge*, 424 U. S. 319, 328 (1976). Like this case, *Mathews* involved a prior recipient whose benefits were terminated. We held there that the nonwaivable exhaustion requirement had been satisfied because, after Eldridge received notice of termination, he "specifically presented the claim that his benefits should not be terminated because he was still disabled." *Id.*, at 329. The preliminary injunction here, however, covers individuals who have never questioned the initial determination that they cease to be disabled. I have difficulty in seeing how these individuals have satisfied the nonwaivable jurisdictional requirement set out in *Salfi*.

The class includes still other individuals who have satisfied *Salfi*'s nonwaivable but not its waivable exhaustion requirement. These individuals may have sought review of the original agency determination that their benefits should be terminated, but they never pursued their claims any further. We held in *Salfi* that the Secretary herself could waive the exhaustion requirement if she deemed it futile in a particular case, but we also held that "a court may not substitute its conclusion as to futility for the contrary conclusion of the Secretary." *Weinberger* v. *Salfi*, 422 U. S., at 766.

In this case the District Court concluded that the Secretary's announced policy of nonacquiescence establishes her final position on the medical improvement issue and that further exhaustion would be futile. Although there are other federal-court opinions which have accepted that argument, there is no decision of this Court that has interpreted the Secretary's announcement of her interpretation of a Social Security statute as a waiver of the exhaustion requirement. See *Ringer* v. *Schweiker*, 697 F. 2d 1291 (CA9 1982), cert. granted, *ante*, p. 1206. The Secretary vigorously pressed the exhaustion argument before the District Court, noting that many of the class members who did exhaust their administrative remedies have had their benefits restored for reasons unrelated to the medical improvement issue. The District Court's determination that exhaustion would be futile seems to me to contradict our holding in *Salfi* that such determinations properly rest with the Secretary and not with the court.

Relying on this Court's decision in *Mathews*, respondents argue that they present the kind of case where deference to the Secretary's judgment concerning the need to exhaust is inappropriate. They argue that they are not making a demand for benefits *per se*, but rather that they are raising a collateral constitutional challenge to the Secretary's failure to comply with Ninth Circuit precedent. I am not persuaded that just because respondents put the label "constitutional" on their claim they can fit within the language of our opinion in *Mathews*. The constitutionality of the failure of the Secretary to provide pretermination hearings in *Mathews* appears substantially different to me from respondents' claim that their benefits were unlawfully terminated because of the Secretary's insufficient evidentiary showing. Unlike the claim in *Mathews*, respondents' unlawful-termination claim could benefit from further factual development and refinement through the administrative process.

Respondents argue that all class members are prior recipients who were once determined to be disabled by a final decision of the Secretary, and that the District Court has merely exercised its broad remedial powers to return the class members to the positions they occupied before the unlawful termination. Whatever might be the merits of such a determination in a lawsuit between private litigants, the remedial powers of a federal court in an action seeking to enjoin an agency of a coordinate branch of the Government are circumscribed by the principles which I have previously stated. This Court recently granted certiorari in *Day* v. *Schweiker*, 685 F. 2d 19 (CA2 1982), cert. granted, 461 U. S. 904 (1983). In that case the Solicitor General contends that an order of payment of interim benefits was beyond the authority of the District Court. If the full Court were to sustain this contention, its opinion might well indicate that an award of interim benefits such as that contained in Paragraph 4(c) of the District Court's order in the present case was likewise beyond the competence of such a court.

The Secretary takes issue with the assessment of comparative equities by the District Court and by the Court of Appeals. For purposes of ruling upon the Secretary's application, I think I must accept, and do accept, the factual conclusions of both of these courts on the question. It bears repeating that if it seemed to me that nothing more were involved than the exercise of a District Court's traditional discretion in fashioning a remedy for an adjudicated harm or wrong, there would be no occasion for me as Circuit Justice to grant a stay where both the Court of Appeals and the District Court had refused to grant one. But as I have stated earlier in this opinion, I do not believe this is such a case. I agree with the statement of this Court in *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141 (1940):

> "A much deeper issue, however, is here involved. This was not a mandate from court to court but from a court to an administrative agency. What is in issue is not the relationship of federal courts *inter se*—a relationship defined largely by the courts themselves—but the due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution. A review by a federal court of the action of a lower court is only one phase of a single unified process. But to the extent that a federal court is authorized to review an administrative act, there is superimposed upon the enforcement of legislative policy through administrative control a different process from that out of which the administrative action under review ensued. The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled

> within the limited scope of 'judicial power' conferred by Congress under the Constitution."

I therefore grant the application of the Secretary to stay Paragraph 4(c) of the order of the District Court pending determination of the Secretary's appeal by the Court of Appeals for the Ninth Circuit.

McGEE *v.* ALASKA

ON APPLICATION FOR BAIL

No. A–156. Decided September 9, 1983

An application for bail pending disposition of applicant state prisoner's petition for certiorari to review the Court of Appeals' affirmance of the District Court's denial of habeas corpus relief, is denied even though the State does not oppose applicant's release on bail. While state authorities can release applicant on bail, it is no part of the federal courts' function to allow bail in federal habeas corpus review of state proceedings simply because the State does not object. Moreover, the probability of this Court's granting certiorari in this case approaches, if it does not reach, zero.

Justice Rehnquist, Circuit Justice.

Applicant has moved for bail pending disposition of his petition for certiorari to the Court of Appeals for the Ninth Circuit. He was tried in the state courts of Alaska and convicted of two crimes under state law. His conviction was affirmed on direct appeal by the Supreme Court of Alaska, *McGee* v. *State*, 614 P. 2d 800 (1980), and we denied certiorari, *McGee* v. *Alaska*, 450 U. S. 967 (1981). He then sought federal habeas relief in the United States District Court for the District of Alaska, claiming that certain evidence should have been suppressed and certain eyewitness testimony should have been excluded. Following a Magistrate's investigation and report, applicant pursued only the Fourth Amendment claim before the District Court, which denied the claim because applicant had received a full and fair hearing on his Fourth Amendment claim in the state courts. The Court of Appeals affirmed the judgment of the District Court, and applicant began serving his sentence.

Applicant, however, seeks to have me implement what amounts to an agreement between the parties to permit his release on bail, since the State has submitted a statement to the effect that it does not oppose release on bail. No doubt the proper Alaska authorities can release applicant on bail any time they choose to do so, but it is no part of the function of the federal courts to allow bail in federal habeas review of state proceedings simply because the State does not object. Requests for bail to this Court are granted only in extraordinary circumstances, especially if, as here, a previous bail application has been denied. See *Julian* v. *United States*, *ante*, p. 1308 (REHNQUIST, J., in chambers). Applicants must also demonstrate a reasonable possibility that four Members of this Court will vote to grant the petition for certiorari. I am satisfied from the papers submitted to me that the probability of this Court's granting certiorari to review the judgment of the Court of Appeals approaches, if it does not actually reach, zero. See *Stone* v. *Powell*, 428 U. S. 465 (1976). Therefore, the application will be denied, notwithstanding the fact that the respondent State does not oppose it.

It is so ordered.

M. I. C., LTD., ET AL. *v.* BEDFORD TOWNSHIP

ON APPLICATION FOR STAY

No. A–147. Decided September 13, 1983

An application by the owner and the operator of a drive-in theater to stay the Michigan trial court's preliminary injunction—in respondent township's action for common-law nuisance based on applicants' recent exhibition of two allegedly obscene films—prohibiting them from showing any films containing scenes of explicit sexual intercourse or other carnal acts, is granted pending decision of their appeal in the Michigan courts. Since it appears that appellate review of the preliminary injunction will not be completed for several months, and since both the Michigan Court of Appeals and the Michigan Supreme Court have refused to stay the injunction pending review, the First Amendment requirement that a State provide procedures to assure a prompt final judicial decision as to the validity of a prior restraint on protected speech has not been satisfied, and thus the stay is warranted.

JUSTICE BRENNAN.

Applicants are the owner and operator of the West Point Auto Theatre, located in the Township of Bedford, Mich. They request that I issue a stay, pending decision of their appeal in the Michigan courts, of a preliminary injunction entered on May 23, 1983, by the Circuit Court for the County of Calhoun, enjoining them from exhibiting allegedly obscene films at the West Point Auto Theatre.[1]

On April 29, 1983, Bedford Township brought this action for common-law nuisance against applicants, seeking a preliminary injunction and claiming that the recent exhibition of two allegedly obscene films at the drive-in theater had created a public nuisance. Following a hearing, the trial court granted the Township's motion. The order, issued on May 23, 1983, enjoined applicants from displaying or projecting on the screen of the West Point Auto Theatre any films containing scenes of explicit sexual intercourse or other carnal acts.

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[1] The application, initially directed to JUSTICE O'CONNOR as Circuit Justice, was, because of her unavailability, referred to me.

By its terms, the preliminary injunction was to continue in effect until a full trial on the matter was held or until further order of the court.

The next day, applicants appealed to the Michigan Court of Appeals, seeking immediate consideration of their application for a stay pending appellate review of the trial court's preliminary injunction. The Court of Appeals, on June 22, 1983, granted the motion for immediate consideration of the stay application but declined to issue a stay of the trial court's order. The court also directed that the case be placed on the calendar of the October 1983 session for a hearing on the merits. Applicants then sought similar relief from the Michigan Supreme Court, and, on August 16, 1983, that court denied both their motion for review prior to consideration of the appeal by the Court of Appeals and for a stay of the preliminary injunction. This application followed.

In support of their request for a stay, applicants principally contend that the delay entailed in processing their appeal before the Michigan Court of Appeals—a delay that they allege may extend up to six months[2]—violates the "procedural safeguards" that must attend the imposition by a State of a prior restraint on protected speech. *Freedman* v. *Maryland*, 380 U. S. 51, 58 (1965).

I recognize at the outset that there is a view that a Circuit Justice generally has authority to issue a stay of a state-court decision only where that decision is a "final judgment or decree" that is subject to review by this Court on writ of certiorari. 28 U. S. C. §§2101(f), 1257(3). The Michigan courts can be expected ultimately to review the trial court's decision and, in that sense, the judgment of the lower court is neither the final decision in this matter, nor one rendered by the State's highest court. But here, as in *National Socialist Party of America* v. *Village of Skokie*, 432 U. S. 43, 44

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[2] This estimate of the appellate timetable is supported by an affidavit submitted by applicants, which respondent has not directly contradicted or refuted.

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(1977), and *Nebraska Press Assn.* v. *Stuart*, 423 U. S. 1327, 1329–1330 (1975) (BLACKMUN, J., in chambers), the State's highest court has refused either to lift the challenged restraint or to provide for immediate appellate review. Such a failure indicates that the state court has decided finally to maintain the restraint in effect during the pendency of review. In this situation, I have no doubt that a Justice of this Court has full power to issue a stay.

Faced with situations similar to that presented here, this Court has repeatedly required that when a State undertakes to shield the public from certain kinds of expression it has labeled as offensive, it must "provide strict procedural safeguards including immediate appellate review. Absent such review, the State must instead allow a stay." *National Socialist Party of America* v. *Village of Skokie*, *supra*, at 44 (citations omitted). See also *Freedman* v. *Maryland*, *supra*, at 59; *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 560–562 (1975); *Vance* v. *Universal Amusement Co.*, 445 U. S. 308, 316–317 (1980); *Nebraska Press Assn.* v. *Stuart*, *supra*, at 1328–1330 (BLACKMUN, J., in chambers).

In this case it appears that in all likelihood appellate review of the preliminary injunction will not be completed for several months. During that time, the trial court's broad proscription will bar, in advance of any final judicial determination that the suppressed films are obscene, the exhibition of any film that might offend the court's ban. Because of the delay involved, this prohibition will remain in effect for a considerable period without any final judicial review of the trial court's order. In these circumstances, the requirement imposed by the First Amendment that a State provide procedures to "assure a prompt final judicial decision," *Freedman* v. *Maryland*, *supra*, at 59, has not been satisfied.

Accordingly, I will grant a stay of the preliminary injunction entered by the trial court on May 23, 1983, and amended on August 15, 1983, pending the disposition of applicants' appeal by the Michigan courts.

KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER *v.* SMITH

ON APPLICATION TO VACATE STAY

No. A-186. Decided September 17, 1983

An application to vacate the stay of execution that the Court of Appeals granted pending issuance of its mandate after consideration of respondent's suggestion for an en banc rehearing of the court's denial of his petition for habeas corpus is denied. It cannot be said that the Court of Appeals abused its discretion in staying respondent's execution.

JUSTICE POWELL, Circuit Justice.

On August 23, 1983, the Court of Appeals for the Eleventh Circuit granted respondent Smith a stay of execution pending consideration of the merits of Smith's petition for habeas corpus. In its opinion, the Court of Appeals stated that the petition raised substantial issues that warranted review. The Attorney General filed an application with me as Circuit Justice requesting that I dissolve and vacate the stay. I denied the application. See *ante*, p. 1321.

On September 9, the Court of Appeals—after a hearing on the merits—denied Smith's petition for habeas corpus. On September 13, Smith filed a suggestion for rehearing en banc and a motion for stay of execution.[1] The Court of Appeals stayed Smith's execution on September 15. The court provided that the stay would remain in effect until the mandate issues. Under the Federal Rules of Appellate Procedure, if Smith's suggestion for rehearing is denied, the mandate will issue automatically after seven days. The Court of Appeals may shorten or lengthen that period by order. Fed. Rule App. Proc. 41(a).

The Attorney General of Georgia filed an application with me on September 16 requesting that I vacate the Court of

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[1] On September 9, the Superior Court of Bibb County, Ga., scheduled Smith's execution for September 21.

Appeals' latest stay. Again I cannot say that the court abused its discretion in staying Smith's execution. The Court of Appeals is in a better position to determine the merits of Smith's request for rehearing and how much time it needs adequately to consider his claims. In the past, the Court of Appeals has addressed this case in an expeditious manner, consistent with our opinion in *Barefoot* v. *Estelle*, *ante*, p. 880. I have no reason to believe that the court will not expedite consideration of Smith's suggestion for rehearing. The Court of Appeals also has authority to order that the mandate issue forthwith if Smith's request for a rehearing is denied.[2]

Accordingly, the application to vacate the stay ordered by the Court of Appeals is denied.

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[2] Smith was convicted January 30, 1975. As I noted in my in-chambers opinion of August 23, this is the fifth time that this case has required action by this Court: once on direct appeal, once on state habeas corpus, once on federal habeas corpus, and twice in Smith's second federal habeas proceeding. Apart from rehearings, this case has now been reviewed 16 times by state and federal courts. Few cases have received more repetitive consideration than this one. I cannot say whether the judicial process has been abused deliberately. Certainly our dual state and federal process, as presently structured by law, invites the years of repetitious litigation experienced in this case. But so long as present law remains unchanged, courts—absent evidence of deliberate abuse—must respect it. Courts, however, can and should expedite consideration in the absence of new and clearly substantial claims.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS 1980, 1981, AND 1982

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
Terms	1980	1981	1982	1980	1981	1982	1980	1981	1982	1980	1981	1982
Number of cases on dockets	24	22	17	2,749	2,935	2,710	2,371	2,354	2,352	5,144	5,311	5,079
Number disposed of during terms	7	6	3	2,227	2,390	2,190	2,021	2,037	2,008	4,255	4,433	4,201
Number remaining on dockets	17	16	14	522	545	520	350	317	344	889	878	878

	TERMS		
	1980	1981	1982
Cases argued during term	154	184	183
Number disposed of by full opinions	144	170	[1] 174
Number disposed of by per curiam opinions	8	10	6
Number set for reargument	2	4	[2] 3
Cases granted review this term	183	212	183
Cases reviewed and decided without oral argument	131	134	135
Total cases to be available for argument at outset of following term	102	126	113

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[1] Excludes No. 81–89 (Signed Opinion).

[2] Includes No. 81–430 (Reargued and decided during term).

JULY 6, 1983

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AIR POLLUTION. See Clean Air Act.

ALCOHOLIC BEVERAGES. See Intoxicating Liquors.

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ATTORNEY'S FEES. See Clean Air Act.

AUDITS BY INTERNAL REVENUE SERVICE. See Federal Rules of Criminal Procedure, 2.

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BAIL.

1. *Bail pending certiorari.*—Application for bail pending disposition of applicant's petition for certiorari to review Court of Appeals' judgment, which affirmed his conviction and sentences for federal offenses, is denied. Julian v. United States (REHNQUIST, J., in chambers), p. 1308.

BAIL—Continued.

2. *Bail pending certiorari.*—State prisoner's application for bail pending disposition of petition for certiorari to review Court of Appeals' affirmance of District Court's denial of habeas corpus relief, is denied even though State does not oppose release on bail. McGee v. Alaska (REHNQUIST, J., in chambers), p. 1339.

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BREATH-ANALYSIS TEST FOR DRUNKEN DRIVING. See **Constitutional Law,** II, 4.

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CITY COUNCIL ELECTIONS. See **Stays,** 3.

CIVIL RIGHTS ACT OF 1871.

Conspiracy against nonunion workers—State involvement—Animus.—An alleged conspiracy to infringe First Amendment rights is not a violation of 42 U. S. C. § 1985(3) (1976 ed., Supp. V) unless it is proved that State is involved in conspiracy or conspiracy's aim is to influence state activity; moreover, kind of animus required by § 1985(3) was not present in action against local unions and others by nonunion workers who were assaulted and beaten at a work site and who alleged a conspiracy by defendants to deprive workers of their First Amendment right not to associate with a union. Carpenters v. Scott, p. 825.

CIVIL RIGHTS ACT OF 1964. See **Employee Retirement Income Security Act of 1974.**

1. *Employment discrimination — Discriminatory intent — Relief.* — Where—in class action against respondent city officials and entities for alleged violations of Title VI of Act because "last-hired, first-fired" policy had resulted in disproportionate layoffs of black and Hispanic police officers hired in order of their test scores that were lower than those of similarly situated whites—(1) District Court held that proof of discriminatory effect was sufficient for Title VI relief and ordered certain relief based on award to each class member of constructive seniority, but (2) Court of Appeals reversed, holding that Title VI relief could not be sustained because proof of discriminatory intent was required, Court of Appeals' judgment

CIVIL RIGHTS ACT OF 1964—Continued.

was affirmed. Guardians Assn. v. Civil Service Comm'n of New York City, p. 582.

2. *Retirement plan—State employees—Sex discrimination.*—Arizona's retirement plan for its employees—whereby they have option of receiving benefits from one of several companies selected by State, all of which pay lower monthly benefits to a woman than to a man who has made the same contributions—discriminates on basis of sex in violation of Title VII of Act, and all benefits derived from future contributions must be calculated without regard to beneficiary's sex; however, benefits derived from prior contributions may be calculated as provided by existing terms of Arizona plan. Arizona Governing Committee v. Norris, p. 1073.

CLEAN AIR ACT.

Emissions standards—Unsuccessful challenge—Attorney's fees.—Absent some degree of success on merits by claimant in action for review of Environmental Protection Agency's emission standards, it is not "appropriate" for a federal court to award attorney's fees under § 307(f) of Act, and thus Court of Appeals should not have granted attorney's fees to respondents after rejecting their challenges to standards limiting coal-burning powerplants' sulfur dioxide emissions. Ruckelshaus v. Sierra Club, p. 680.

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I. Cruel and Unusual Punishment.

1. *Capital sentencing hearing—Instructions—Governor's power to commute sentence.*—Eighth and Fourteenth Amendments do not prohibit an instruction permitting capital sentencing jury at penalty phase of state-court trial to consider Governor's power to commute a life sentence without possibility of parole; nor is such instruction unconstitutional because it fails to inform jury also of Governor's power to commute a death sentence. California v. Ramos, p. 992.

CONSTITUTIONAL LAW—Continued.

2. *Disproportionate punishment—Sentence as recidivist.*—Respondent's life sentence without possibility of parole was significantly disproportionate to his crime, and was therefore prohibited by Eighth Amendment, where he was convicted of uttering a "no account" check for $100, a crime ordinarily having a maximum penalty of five years' imprisonment and a $5,000 fine, and was sentenced under South Dakota's recidivist statute because of six prior felony convictions, all of which were neither violent nor a crime against a person; possibility of commutation of a life sentence under South Dakota law was not sufficient to save respondent's otherwise unconstitutional sentence. Solem v. Helm, p. 277.

II. Due Process.

1. *Acquittal because of insanity—Confinement in mental hospital.*—When a criminal defendant (such as petitioner, who was tried for an offense under District of Columbia Code) establishes by a preponderance of evidence that he is not guilty by reason of insanity, Constitution permits Government to confine him to a mental institution until he has regained his sanity or is no longer a danger to himself or society, and he is not entitled to release merely because he has been hospitalized longer than he could have been incarcerated if convicted. Jones v. United States, p. 354.

2. *Adoption of illegitimate child—Notice to putative father.*—Where (1) appellant putative father of a child born out of wedlock had never established a substantial relationship with his child and had not entered his name in "putative father registry," which would have entitled him under New York law to notice of adoption proceedings, and (2) appellant was not notified of adoption proceeding instituted by child's mother and her husband, appellant's rights under Due Process and Equal Protection Clauses were not violated by failure of New York law to require that notice be given to him. Lehr v. Robertson, p. 248.

3. *Capital sentencing hearing—Psychiatric testimony.*—State's use at capital sentencing hearing of psychiatric testimony predicting petitioner's dangerousness, based on hypothetical questions, did not violate petitioner's right to due process; Federal Court of Appeals did not err in refusing to stay petitioner's death sentence pending appeal of District Court's denial of habeas corpus relief, since it was clear that Court of Appeals ruled on merits of petitioner's claim in denying stay and that petitioner had ample opportunity to address merits. Barefoot v. Estelle, p. 880.

4. *Drunken driving—Implied-consent statute—Arresting officer's affidavit.*—Due Process Clause does not require an arresting officer in enforcing Illinois implied-consent statute—which provides that a driver may request a hearing prior to suspension of his license for refusing to take a breath-analysis test after his arrest for drunken driving—to recite in affidavit, required by statute, specific evidentiary matters constituting underlying circumstances which provided officer with a reasonable belief that

CONSTITUTIONAL LAW—Continued.

arrestee was driving under influence of intoxicating liquor. Illinois v. Batchelder, p. 1112.

5. *Wounding of criminal suspect by police—Responsibility for medical treatment.*—Due Process Clause, rather than Eighth Amendment's proscription of cruel and unusual punishment, requires responsible governmental entity to provide medical care to persons who have been injured while being apprehended by police, and respondent hospital had Art. III standing to raise constitutional claim against petitioner city where a city police officer had wounded a fleeing suspect who was then taken to hospital for treatment; however, state law, rather than Federal Constitution, governs how cost of medical care should be allocated as between governmental entity and provider of care. Revere v. Massachusetts General Hospital, p. 239.

III. Establishment of Religion.

1. *State income tax—Deduction for educational expenses.*—A Minnesota statute that allows state taxpayers, in computing their state income tax, to deduct expenses incurred in providing tuition, textbooks, and transportation for their children attending an elementary or secondary school does not violate Establishment Clause. Mueller v. Allen, p. 388.

2. *State legislature—Prayer to open session.*—Nebraska Legislature's practice of beginning each of its sessions with a prayer by a chaplain selected by legislature and paid by State does not violate Establishment Clause. Marsh v. Chambers, p. 783.

IV. Freedom of Speech.

Advertisements—Contraceptives.—Title 39 U. S. C. § 3001(e)(2), which prohibits mailing of unsolicited advertisements for contraceptives, is unconstitutional as applied to appellee contraceptive manufacturer's proposed mailings of unsolicited advertisements including informational pamphlets promoting its products but also discussing venereal disease and family planning. Bolger v. Youngs Drug Products Corp., p. 60.

V. Right to Counsel.

Counsel's duty to raise issues on appeal.—Defense counsel assigned to prosecute an appeal from a criminal conviction does not have a constitutional duty to raise every nonfrivolous issue requested by defendant. Jones v. Barnes, p. 745.

VI. Searches and Seizures.

1. *Container search—Reseizure after "controlled delivery."*—Where (1) locked container was opened by a customs officer at an airport and marihuana was discovered concealed in a table therein, (2) table and container were resealed and delivered to respondent, (3) one officer saw respondent take container into his apartment and maintained surveillance while an-

CONSTITUTIONAL LAW—Continued.

other officer went for a warrant to search apartment, (4) some 30 or 45 minutes after delivery, but before other officer could return with a warrant, respondent emerged from apartment with container and was immediately arrested, and (5) container was reopened at station house and marihuana concealed in table was seized, warrantless reopening of container did not violate respondent's Fourth Amendment rights. Illinois v. Andreas, p. 765.

2. *Protective search—Passenger compartment of automobile.*—Where (1) police officers stopped to investigate when car being erratically driven by respondent swerved into ditch, (2) respondent, who was then standing at rear of car, did not respond to initial request to produce his license and registration and began walking toward car door, (3) officers, upon observing hunting knife on car floor, stopped respondent and conducted a patdown search, which revealed no weapons, (4) one of officers then saw something protruding from under armrest on front seat, raised armrest, and saw an open pouch that contained what appeared to be marihuana, and (5) a further search of car's passenger compartment, after respondent was arrested, revealed no more contraband, protective search of passenger compartment was reasonable under Fourth Amendment. Michigan v. Long, p. 1032.

VII. Self-Incrimination.

Confessions—Custodial interrogation—Miranda warnings.—Where (1) after respondent informed police of a homicide in which he was involved, he voluntarily accompanied them to station house, having been told he was not under arrest, (2) he was not given *Miranda* warnings and was allowed to leave after a brief interview, (3) he was arrested five days later, received *Miranda* warnings, and gave a second confession in which he admitted the voluntariness of his earlier interview, and (4) his statements at both interviews were admitted in evidence at his state-court trial, which resulted in a conviction, *Miranda* warnings were not required at his first interview, which did not constitute "custodial interrogation." California v. Beheler, p. 1121.

CONTAINER SEARCHES. See **Constitutional Law,** VI, 1.

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CRIMINAL LAW. See **Bail; Constitutional Law,** I; II, 2, 3, 5; V; VI; VII; **Death Penalty; Federal Rules of Criminal Procedure; Stays,** 1, 8–10.

CRUEL AND UNUSUAL PUNISHMENT. See **Constitutional Law,** I; II, 5.

CUSTODIAL POLICE INTERROGATIONS. See **Constitutional Law, VII.**

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Aggravating circumstances—Prior criminal record.—Where Florida trial judge, after capital sentencing hearing, rejected jury's recommendation of life imprisonment and sentenced petitioner to death—judge having found existence of several statutory aggravating circumstances and no mitigating circumstances, but also having (improperly under Florida law) considered petitioner's prior criminal record as an aggravating circumstance—Florida Supreme Court's judgment, affirming trial court's judgment, was affirmed. Barclay v. Florida, p. 939.

DISABILITY BENEFITS. See **Employee Retirement Income Security Act of 1974; Stays, 6.**

DISCLOSURE BY ENVIRONMENTAL PROTECTION AGENCY OF HEALTH AND SAFETY DATA. See **Stays, 5.**

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DISCRIMINATION BASED ON RACE. See **Civil Rights Act of 1964, 1.**

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1. *Grand jury materials—Disclosure to Government attorneys and their staff.*—Attorneys in Civil Division of Justice Department and their

FEDERAL RULES OF CRIMINAL PROCEDURE—Continued.

assistants and staff may not obtain automatic disclosure under Rule 6(e)(3)(A)(i) of grand jury materials for use in a civil suit, but instead must seek a court order for access to such materials under Rule 6(e)(3)(C)(i), requiring a strong showing of particularized need for disclosure. United States v. Sells Engineering, Inc., p. 418.

2. *Grand jury materials—Disclosure to IRS.*—Where Government sought disclosure of grand jury materials to Internal Revenue Service for use in an audit to determine civil income tax liability of respondent, who had been target of grand jury's investigation that did not result in an indictment, disclosure was not available under Rule 6(e)(3)(C)(i) since audit was not "preliminar[y] to or in connection with a judicial proceeding." United States v. Baggott, p. 476.

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JURISDICTION.

1. *Indian water rights—State-court jurisdiction.*—McCarran Amendment, which waived United States' immunity as to comprehensive state water rights adjudications, removed any limitations that Enabling Acts admitting States to Union or federal policy may have originally placed on state-court jurisdiction over Indian water rights, and where state courts have jurisdiction to adjudicate Indian water rights, concurrent federal suits—even though brought by Indian tribes rather than Government and even though seeking adjudication only of Indian water rights—are subject to dismissal. Arizona v. San Carlos Apache Tribe, p. 545.

2. *State-court action—Removal to federal court.*—Where petitioner Tax Board, in California state-court action against respondent trust (established to administer a bargaining agreement's provisions as to workers' vacations) and trustees, asserted that (1) trust was liable for damages for its failure to comply with tax levies under a California statute, and (2) a judgment should be issued declaring parties' rights in view of respondents' contention that federal Employee Retirement Income Security Act of 1974 pre-empted state law and trustees lacked power to honor levies, case was not within Federal District Court's removal jurisdiction since, under "well-pleaded complaint" rule, case did not fall within "federal question" jurisdiction. Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for Southern California, p. 1.

3. *Supreme Court—Review of state-court decision.*—This Court does not lack jurisdiction to decide a case on asserted ground that state-court decision below rested on an adequate and independent state ground, where decision below fairly appears to rest primarily on federal law or to be interwoven with federal law, and where adequacy and independence of any possible state-law ground is not clear from face of opinion. Michigan v. Long, p. 1032.

JURORS. See **Stays,** 8.

JURY INSTRUCTIONS AS TO CAPITAL OFFENSE SENTENCES. See **Constitutional Law,** I, 1.

KENTUCKY. See **National Labor Relations Act,** 1.

LABOR UNION CONSPIRACIES AGAINST NONUNION WORKERS. See **Civil Rights Act of 1871.**

LABOR UNION'S HANDBILLING AT SHOPPING CENTER. See **National Labor Relations Act,** 2.

LEGISLATURE'S CHAPLAINCY PRACTICE. See **Constitutional Law,** III, 2.

LICENSES TO SELL INTOXICATING LIQUORS. See **Intoxicating Liquors.**

LIFE SENTENCES. See **Constitutional Law, I.**

MAILING OF CONTRACEPTIVE ADVERTISEMENTS. See **Constitutional Law, IV.**

McCARRAN AMENDMENT. See **Jurisdiction, 1.**

MEDICAL TREATMENT OF INJURED CRIMINAL SUSPECT. See **Constitutional Law, II, 5.**

MENTAL ILLNESS AS GROUND FOR ACQUITTAL. See **Constitutional Law, II, 1.**

MINNESOTA. See **Constitutional Law, III, 1.**

MIRANDA WARNINGS. See **Constitutional Law, VII.**

MONTANA. See **Jurisdiction, 1.**

MOTOR VEHICLE SAFETY STANDARDS. See **National Traffic and Motor Vehicle Safety Act of 1966.**

MUNICIPALITY'S LIABILITY FOR MEDICAL TREATMENT OF INJURED CRIMINAL SUSPECT. See **Constitutional Law, II, 5.**

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION. See **National Traffic and Motor Vehicle Safety Act of 1966.**

NATIONAL LABOR RELATIONS ACT.

1. *Strikes—Replacement employees—State causes of action—Pre-emption.*—Where petitioner hired respondents as replacements for striking employees and assured respondents that they would be permanent replacements, but petitioner—pursuant to settlement with union of mutual unfair labor practice charges filed with National Labor Relations Board—later laid off respondents to make room for returning strikers, respondents' causes of action in Kentucky state-court suit against petitioner to recover damages for misrepresentation and breach of contract were not pre-empted by Act. Belknap, Inc. v. Hale, p. 491.

2. *Unfair labor practices—Secondary boycotts—Union's handbilling at shopping center.*—Where, because of a dispute between respondent union and a contractor retained by a department store company to construct a store in petitioner's shopping center, union passed out handbills urging consumers not to patronize any of stores in center until petitioner publicly promised that all construction at center would be done by contractors who paid their employees fair wages and fringe benefits, handbilling did not come within "publicity proviso" of § 8(b)(4) of Act, which exempts certain publicity from that section's prohibition of secondary boycotts. Edward J. DeBartolo Corp. v. NLRB, p. 147.

NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT OF 1966.

Motor vehicle passive restraints—Rescission of regulation.—National Highway Traffic Safety Administration's rescission under Act of agency's 1977 standard requiring that motor vehicles produced after September 1982 be equipped with passive restraints (automatic seatbelts or airbags), because agency could no longer find that requirement would produce significant safety benefits, was arbitrary and capricious. Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co., p. 29.

NATURAL GAS ACT. See **Natural Gas Policy Act of 1978.**

NATURAL GAS POLICY ACT OF 1978.

Prices for "first sales"—FERC regulations.—With regard to Federal Energy Regulatory Commission's regulations implementing Act's provisions relating to maximum prices for "first sales" of natural gas, Commission's exclusion of pipeline production from Act's pricing scheme was inconsistent with statutory mandate and Congress' intent; however, Commission has discretion in deciding which transfer by pipeline—intracorporate or downstream—should receive "first sale" treatment. Public Service Comm'n v. Mid-Louisiana Gas Co., p. 319.

NEBRASKA. See **Constitutional Law,** III, 2.

NEWS MEDIA COVERAGE OF TRIAL. See **Stays,** 8.

NEW YORK. See **Constitutional Law,** II, 2; **Employee Retirement Income Security Act of 1974.**

NONUNION WORKERS' RIGHTS. See **Civil Rights Act of 1871.**

NOTICE OF ADOPTION PROCEEDING. See **Constitutional Law,** II, 2.

OBLIGATIONS OF UNITED STATES AS EXEMPT FROM TAXATION. See **State Property Taxes.**

OBSCENE MOVIES. See **Stays,** 7.

PAROCHIAL SCHOOLS. See **Constitutional Law,** III, 1.

PATDOWN SEARCHES. See **Constitutional Law,** VI, 2.

PESTICIDES. See **Stays,** 5.

PHOTOGRAPHING JURORS DURING TRIAL. See **Stays,** 8.

PIPELINE SALES OF NATURAL GAS. See **Natural Gas Policy Act of 1978.**

POLICE INTERROGATIONS. See **Constitutional Law,** VII.

POWERPLANT EMISSIONS. See **Clean Air Act.**

PRAYER TO OPEN LEGISLATURE'S SESSIONS. See Constitutional Law, III, 2.

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See Employee Retirement Income Security Act of 1974; Intoxicating Liquors; Jurisdiction, 2; National Labor Relations Act, 1; State Corporate Franchise Taxes.

PREGNANCY DISCRIMINATION ACT OF 1978. See Employee Retirement Income Security Act of 1974.

PRICE REGULATIONS FOR NATURAL GAS SALES. See Natural Gas Policy Act of 1978.

PRIOR CRIMINAL RECORD AS AGGRAVATING CIRCUMSTANCE WARRANTING DEATH PENALTY. See Death Penalty.

PRIVATE SCHOOLS. See Constitutional Law, III, 1.

PROPERTY TAXES. See State Property Taxes.

PROPORTIONALITY OF PUNISHMENT. See Constitutional Law, I, 2.

PROTECTIVE SEARCHES. See Constitutional Law, VI, 2.

PSYCHIATRIC TESTIMONY AT CAPITAL SENTENCING HEARING. See Constitutional Law, II, 3.

PUBLIC EMPLOYEES. See Civil Rights Act of 1964, 2.

PUTATIVE FATHER'S RIGHT TO NOTICE OF ADOPTION PROCEEDING. See Constitutional Law, II, 2.

RACIAL DISCRIMINATION. See Civil Rights Act of 1964, 1.

RATES FOR SALES OF NATURAL GAS. See Natural Gas Policy Act of 1978.

RECIDIVIST STATUTES. See Constitutional Law, I, 2.

REFUSAL TO TAKE BREATH-ANALYSIS TEST. See Constitutional Law, II, 4.

REGISTRATION OF PESTICIDES. See Stays, 5.

RELIGIOUS SCHOOLS. See Constitutional Law, III, 1.

REMOVAL OF STATE-COURT ACTION TO FEDERAL COURT. See Jurisdiction, 2.

REPLACEMENTS FOR STRIKING EMPLOYEES. See National Labor Relations Act, 1.

RESCISSION OF MOTOR VEHICLE SAFETY STANDARDS. See National Traffic and Motor Vehicle Safety Act of 1966.

RESEIZURES OF CONTAINERS. See **Constitutional Law, VI, 1.**

RES JUDICATA. See **Water Rights.**

RETIREMENT BENEFITS. See **Civil Rights Act of 1964, 2.**

RIGHT OF ASSOCIATION. See **Civil Rights Act of 1871.**

RIGHT TO COUNSEL. See **Constitutional Law, V.**

SAFETY STANDARDS FOR MOTOR VEHICLES. See **National Traffic and Motor Vehicle Safety Act of 1966.**

SCHOOL COMMITTEE ELECTIONS. See **Stays, 3.**

SCHOOLS. See **Constitutional Law, III, 1.**

SEARCHES AND SEIZURES. See **Constitutional Law, VI.**

SEATBELTS FOR MOTOR VEHICLES. See **National Traffic and Motor Vehicle Safety Act of 1966.**

SECONDARY BOYCOTTS. See **National Labor Relations Act, 2.**

SECRETARY OF HEALTH AND HUMAN SERVICES. See **Stays, 6.**

SECTARIAN SCHOOLS. See **Constitutional Law, III, 1.**

SECURITIES AND EXCHANGE COMMISSION. See **Securities Regulation.**

SECURITIES EXCHANGE ACT OF 1934. See **Securities Regulation.**

SECURITIES REGULATION.

Inside trading—Tippee's duty to disclose information.—Where (1) petitioner officer of a broker-dealer received information from a former officer of an insurance company that its assets were overstated as a result of fraudulent corporate practices, (2) petitioner, during his investigation of allegations, urged Wall Street Journal to publish a story on fraud allegations and discussed his investigation with clients and investors, some of whom sold their holdings in company, and (3) fraud was subsequently disclosed to public, petitioner had no duty, under principles governing inside trading and tippees' disclosure obligations, to abstain from use of inside information and thus did not violate § 10(b) of Securities Exchange Act of 1934 or Securities and Exchange Commission's Rule 10b-5. Dirks v. SEC, p. 646.

SELF-INCRIMINATION. See **Constitutional Law, VII.**

SENIORITY RIGHTS OF EMPLOYEES. See **Civil Rights Act of 1964, 1.**

SEX DISCRIMINATION. See **Civil Rights Act of 1964, 2.**

SHOPPING CENTER BOYCOTTS. See **National Labor Relations Act, 2.**

SKETCHING JURORS DURING TRIAL. See **Stays,** 8.

SOCIAL SECURITY DISABILITY BENEFITS. See **Stays,** 6.

SOVEREIGN'S IMMUNITY FROM SUIT. See **Jurisdiction,** 1; **Tucker Act.**

STANDARD OF PROOF OF INSANITY. See **Constitutional Law,** II, 1.

STANDING TO SUE. See **Constitutional Law,** II, 5.

STATE CORPORATE FRANCHISE TAXES.

Application to unitary businesses—Foreign subsidiaries—Validity of California law.—California properly applied "unitary business" principle of its corporate franchise tax to appellant Delaware corporation (doing business in California and elsewhere) and its overseas subsidiaries (operating in foreign countries), and properly applied formula apportionment as to income of that unitary business; California had no obligation under Foreign Commerce Clause to employ "arm's-length" analysis used by Federal Government and most foreign nations in evaluating tax consequences of intercorporate relationships, and California's tax was not pre-empted by federal law or inconsistent with federal policy. Container Corp. v. Franchise Tax Board, p. 159.

STATE INCOME TAXES. See **Constitutional Law,** III, 1.

STATE PROPERTY TAXES.

Bank shares—Computation of tax—United States obligations.—Texas property tax on bank shares—computed on basis of bank's net assets without any deduction for value of United States obligations held by bank—violates a federal statute exempting United States obligations from computation of state or local taxes; nor is Texas tax authorized by a federal statute prohibiting States from imposing discriminatory taxes on national banks. American Bank & Trust Co. v. Dallas County, p. 855.

STAYS. See also **Constitutional Law,** II, 3.

1. *Death sentence.*—Application to stay execution is granted, where execution was set for a date before expiration of period for applicant's filing a petition for certiorari to review Missouri Supreme Court's affirmance of his conviction and death sentence. Williams v. Missouri (BLACKMUN, J., in chambers), p. 1301.

2. *Injunction—Condemnation—Hawaii Land Reform Act.*—Application to stay an order of Court of Appeals—which, after holding condemnation provisions of Hawaii Land Reform Act unconstitutional, entered challenged order that recalled its mandate for clarification and, pending such clarification, enjoined applicants from pursuing any state proceedings under Act—is denied. Hawaii Housing Authority v. Midkiff (REHNQUIST, J., in chambers), p. 1323.

STAYS—Continued.

3. *Injunction—Election of Boston City Council and School Committee.*—Application to stay District Court's judgment—holding unconstitutional, and enjoining elections under, a new districting plan for election of members of Boston City Council and School Committee—is denied. Bellotti v. Latino Political Action Committee (BRENNAN, J., in chambers), p. 1319.

4. *Injunction—Football telecasts.*—Application by association of colleges, universities, and athletic conferences to stay lower federal courts' judgments—holding that antitrust laws were violated by applicant's plan involving contracts with television networks for broadcasting football games, and enjoining further implementation of contracts—is granted. National Collegiate Athletic Assn. v. Board of Regents, Univ. of Okla. (WHITE, J., in chambers), p. 1311.

5. *Injunction—Registration of pesticides.*—Application to stay injunction of District Court—which held unconstitutional, and enjoined enforcement of, provisions of Federal Insecticide, Fungicide, and Rodenticide Act relating to registration of pesticides with Environmental Protection Agency and to public disclosure of health and safety data—is denied. Ruckelshaus v. Monsanto Co. (BLACKMUN, J., in chambers), p. 1315.

6. *Injunction—Termination of social security disability benefits.*—Application by Secretary of Health and Human Services—who had terminated social security disability benefits without first producing evidence that recipient's medical condition had improved, contrary to Ninth Circuit decisions requiring such proof—to stay portion of District Court's preliminary injunction requiring Secretary to pay benefits to reapplying prior recipients until she established their lack of disability through hearings complying with Ninth Circuit rule, is granted pending appeal to Court of Appeals for Ninth Circuit. Heckler v. Lopez (REHNQUIST, J., in chambers), p. 1328.

7. *State-court injunction—Exhibiting allegedly obscene movies.*—Application by owner and operator of a drive-in theater to stay Michigan trial court's preliminary injunction—in respondent township's common-law nuisance action based on recent exhibition of allegedly obscene films—prohibiting applicants from showing any films containing scenes of explicit sexual intercourse or other carnal acts, is granted pending decision of their appeal in state courts. M. I. C., Ltd. v. Bedford Township (BRENNAN, J., in chambers), p. 1341.

8. *Trial court orders—News media restrictions.*—Application to stay Pennsylvania trial court's orders is granted insofar as they prohibited publication of names or addresses of jurors who served in a homicide trial that has since been completed, but application is denied insofar as orders (1) prohibited sketching, photographing, televising, or videotaping jurors during trial, and (2) restricted access to exhibits. Capital Cities Media, Inc. v. Toole (BRENNAN, J., in chambers), p. 1303.

STAYS—Continued.

9. *Vacation of Court of Appeals' stay—Death sentence.*—Application to vacate Court of Appeals' stay of respondent's execution is denied. Kemp v. Smith (POWELL, J., in chambers), p. 1321.

10. *Vacation of Court of Appeals' stay—Death sentence.*—Application to vacate stay of execution that Court of Appeals granted pending issuance of its mandate after consideration of respondent's suggestion for an en banc rehearing of court's denial of his petition for habeas corpus, is denied. Kemp v. Smith (POWELL, J., in chambers), p. 1344.

STRIKES. See **National Labor Relations Act, 1.**

SUPREME COURT. See also **Jurisdiction, 3.**

Term statistics, p. 1346.

SUSPENSION OF DRIVER'S LICENSE FOR REFUSAL TO TAKE BREATH-ANALYSIS TEST. See **Constitutional Law, II, 4.**

TAXES. See **Constitutional Law, III, 1; Federal Rules of Criminal Procedure, 2; State Corporate Franchise Taxes; State Property Taxes.**

TELEVISING FOOTBALL GAMES. See **Stays, 4.**

TELEVISING JURORS DURING TRIAL. See **Stays, 8.**

TERMINATION OF SOCIAL SECURITY DISABILITY BENEFITS. See **Stays, 6.**

TEXAS. See **State Property Taxes.**

TIMBERLANDS IN INDIAN RESERVATIONS. See **Tucker Act.**

TIPPEE'S DUTY TO DISCLOSE INSIDE INFORMATION. See **Securities Regulation.**

TUCKER ACT.

Government's consent to suit—Mismanagement of Indian reservation timberlands.—Act furnishes United States' consent to suit for claims founded upon statutes or regulations that create substantive rights to money damages, and thus Government was accountable in damages for alleged breaches of trust as to its duties to allottees of Indian reservation lands under various federal laws governing United States' management of timberlands in reservation. United States v. Mitchell, p. 206.

TWENTY-FIRST AMENDMENT. See **Intoxicating Liquors.**

UNFAIR LABOR PRACTICES. See **National Labor Relations Act.**

UNION CONSPIRACIES AGAINST NONUNION WORKERS. See **Civil Rights Act of 1871.**

UNION'S HANDBILLING AT SHOPPING CENTER. See **National Labor Relations Act, 2.**

"UNITARY BUSINESS" PRINCIPLE. See **State Corporate Franchise Taxes.**

UNITED STATES' IMMUNITY FROM SUIT. See **Jurisdiction,** 1; **Tucker Act.**

UNITED STATES OBLIGATIONS AS EXEMPT FROM TAXATION. See **State Property Taxes.**

VACATION OF STAYS. See **Stays,** 9, 10.

VIDEOTAPING JURORS DURING TRIAL. See **Stays,** 8.

WATER RIGHTS. See also **Jurisdiction,** 1.

Suit by Government on behalf of Indian reservation—Earlier action—Res judicata.—Where (1) United States had filed an earlier suit in Federal District Court against all water users on Truckee River in Nevada to adjudicate water rights to river for benefit of an Indian reservation and a reclamation project, (2) a final decree was entered in 1944, and (3) United States filed present action in same court on behalf of same reservation against defendants who included all defendants in first action and their successors, res judicata prevented United States and Indian tribe from litigating instant claim involving reallocation of water rights previously decreed to reservation and reclamation project. Nevada v. United States, p. 110.

WEAPONS SEARCHES. See **Constitutional Law,** VI, 2.

"WELL-PLEADED COMPLAINT" RULE. See **Jurisdiction,** 2.